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The ongoing debate and dialogue between the jurisprudence of the ECtHR and the CJEU regarding the affirmation of the guilt principle in European criminal law. Continued harmonization and/or unnecessary challenges

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The ongoing debate and dialogue between the jurisprudence of the ECtHR and the CJEU regarding the affirmation of the guilt principle in European criminal law. Continued harmonization and/or unnecessary challenges

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Abstract: The present paper aims to conduct a broad comparative investigation of the guilt principle within the European context. The path followed by the jurisprudence of two important courts, namely the European Court of Human Rights and the Court of Justice of the European Union, in this area has revealed a long, arduous, and uncertain future. Steps forward and backward in the area of guilt, in collaboration with other principles and through the protection of human rights, make the dialogue between the courts precise and often varied. The journey is not yet over, and the road is long, not so much in identifying guilt but in protecting human rights as the affirmation of a system whose ultimate goal is a higher level of protection for human beings.

Keywords: European criminal law; ECHR; CFREU; ECtHR; CJEU; guilt principle; *nullum crimen*; principle of proportionality; presumption of innocence; rehabilitation of punishment; subjective/objective responsibility; confiscation without conviction; principle of non-retroactivity; fairness of trial.

Introduction

In discussing and affirming the guilt principle as a fundamental right in the criminal law of the European Union, we have encountered some difficulty regarding the level of maturity, harmony, and integration of Union law.

The recognition of fundamental rights of the Union through the Court of Justice of the European Union (CJEU) is one of the general principles of law that guarantees a certain degree of certainty with reference to the constitutional traditions of the Union's Member States as well as the international conventions that collaborate with each other, adhered to the Charter for the Fundamental Rights of the European Union (CFREU) (Peers and others, 2021),[1] which is created on 7 December 2000 by the

1CJEU, C-305/05, Ordre des barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Orde van Vlaamse balies, Nederlandse Orde van advocaten bij de balie te Brussel, e Conseil des ministres of 26 June 2007, ECLI:EU:C:2007:383, I-05305. joined cases C-387, 391 and 403/02, Berlusconi of 3 May 2005, ECLI:EU:C:2005:270, I-03565, par. 67. Joined cases C-20/00 and C-64/00, Booker Aquaculture and Hydro Seafood of 10 July 2003,

European Parliament the Council and the European Commission.

A Charter on human rights, which already in the Treaty of Lisbon, and in particular in Article 6, paragraph 1, letter c), attributed to the CFREU a legal value for the treaties as a legally binding value was confirmed by the CJEU.[2]

It was the Treaty of Lisbon itself through Art. 2 TEU (Liakopoulos, 2019; Kellerbauer, Klamert, Tomkin, 2024) that affirmed that the UN was based on the recognition of human rights which are considered as common values for the Member States.[3]

Fundamental rights have become an integral part of a European legal system.[4] Therefore, limits have imposed on human rights as well as on the institutions of the European Union to a legal

ECLI:EU:C:2003:397, I-07411, par. 92. C-112/00, Schmidberger of 12 June 2003, ECLI:EU:C:2003:333, I-05659, par. 71. C-299/95, Kremzow of 29 May 1997, ECLI:EU:C:1997:254, I-02629. C-44/79, Hauer of 13 December 1979, ECLI:EU:C:1979:290, I-03727. C-36/75, Rutili of 28 October 1975, ECLI:EU:C:1975:137, I-01219, parr. 27-28. C-4/73, Nold of 14 May 1974, ECLI:EU:C:1974:51, I-00491. C-11/70, Handelsgesellschaft of 17 December 1970, ECLI:EU:C:1970:114, I-01125. C-129/96, Inter-Environment Wallonie of 18 December 1997, ECLI:EU:C:1997:628, I-07411, par. 45. C-26/62, Van Gend & Loos of 5 February 1963, ECLI:EU:C:1963:1, ECR 00003. joined cases C-238/99 P C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P and C-252/99 P and C-254/99 P, Lymburgse Vinyl Maatschappij NV (LVM) and others of 15 October 2002, ECLI:EU:C:2002:582, I-08375, par. 29. T-113/96, Dubois and sons of 29 January 1998, ECLI:EU:T:1998:11, II-00125, par. 125. T-51/96, Miwon Co. Ltd. v. Council of 30 March 2000, ECLI:EU:T:2000:92, II-01841, par. 19.

2CJEU, C-564/19, IS (Illégalité de l'ordonnance de renvoi) of 23 November 2021, ECLI:EU:C:2021:949, not yet published, par. 98.

3CJEU, C-249/16, S. Kareda v. S. Benkò of 15 June 2017, ECLI:EU:C:2017:472, published in the electronic Reports of the cases.

4CJEU, C-299/95, Kremzow of 29 May 1997, ECLI:EU:C:1997:254, I-02629. C-144/95, Maurin of 13 June 1996, ECLI:EU:C:1996:235, I-02909.

system that the member states seek to apply the European criminal law of the Union (Bleckmann, 1992; Vervaele, 1994).[5]

In other words, we speak of principles that derive from the relevant jurisprudence of bodies including the European Convention on Human Rights (ECHR) (De Salvia, 1990; Schutte, 1992).

A path had been opened and also confirmed by the CJEU itself through the advocate general Jacobs. In the Wachauf case, he stated that the member states acted according to the competences attributed by Union law. They are subject to obligations where the European legislator finds the basis to safeguard and protect the principle of fundamental rights.[6]

According to Art. 6TEU (Kellerbauer, Klamert, Tomkin, 2024), the principles are considered the common heritage of the member states. In fact, the member states welcomed and oriented them towards the Union through Art. 49 TEU (Kellerbauer, Klamert, Tomkin, 2024).

The protection of fundamental human rights did not determine from the outset the extension of application of treaty provisions that fall outside the competences of the Union, as stated in Art. 51, par. 2 CFREU (Peers, 2021).[7] This continues the exclusion

5CJEU, C-177/94, Perfili of 1st February 1996, ECLI:EU:C:1996:24, I-00161, par. 161. C-91/94 of 9 November 1995, ECLI:EU:C.1995:374, I-03911

6CJEU, C-5/88, Wachauf of 13 July 1989, ECLI:EU:C:1989:321, I-02669.

7CJEU, C-564/19, IS (Illégalité de l'ordonnance de renvoi) of 23 November 2021, op. cit.,par. 98. C-398/22, Generalstaatsanwaltschaft Berlin (Condamnation par défaut) of 21 December 203, ECLI:EU:C:2023:1031, published in the electronic

of a justice system that assesses the compatibility of domestic fundamental rights legislation. Its respect is linked:

"(...) with domestic legislation, even if it does not constitute the implementation of European legislation, it nevertheless comes to affect an area of competence of the Union or in sectors already regulated by Union law (…)".[8]

Respect for fundamental rights thus deconstitutionalizes and gives a symbolic value to the Charter of Rights, also representing a core of identity that is common to the idea of each national constitution and a parameter that measures new accessions. In this way, the CFREU allows and formalizes a system of protection for fundamental rights by building a recognizing value of a para-constitutional European framework, a tool that contributes to and limits the:

"(…) relativism of domestic legal systems through the recognition of common values capable of favoring, under various profiles, a rapprochement of national legal systems (…) of the punitive choices provided for therein (…)" (Van Drooghenbroeck, 2001; Sudre, 2021; Villiger, 2023).[9]

The relative defense before the European Court of Human Rights (ECHR) is allowed without appealing to other member states, which are the object of the acts of the Union.

Reports of the cases. C-58/22, Parchetul de pe lângă Curtea de Apel Craiova of 25 January 2024, ECLI:EU:C:2024:70, published in the electronic Reports of the cases.

8CJEU, joined cases C-60/84 and C-61/84, Cinéthèque of 11 July 1985, ECLI:EU:C:1985:122, I-02605. C-12/86, Demirel of 30 September 1987, ECLI:EU:C:1987:400, I-03719. C-159/90, Society for the protection of Unborn Children Ireland of 11 June 1991, ECLI:EU:C:1991:249, I-4685, par. 26. C-5/88, Wachauf of 13 July 1989, op. cit., par. 17

9ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland of 30 June 2005.

The CFREU is not interpreted strictly, restrictively, towards situations guaranteed by Union law, since international law plays an important role through the international conventions ratified by Member States, including the ECHR. These rights correspond to those guaranteed by the ECHR itself, which can be limited to Union law and the ECHR itself. Union law thus grants extensive protection, which the ECHR itself grants as a minimum guarantee under Article 52, paragraph 3.

The CFREU, in Chapter VI, dedicated to justice, provides for the right to an effective remedy by an impartial judge. It also includes other rights such as the presumption of innocence, the right of the defence to a fair trial, the principles of legality, proportionality, penalties that respect criminal offences, the right not to be tried and punished twice for the same offence, etc. This is also the case of Regulation No. 1/2003[10] in the field of competition and sanctions, where it states:

"(...) this Regulation complies with fundamental rights and observes the principles enshrined in particular in the Charter of Fundamental Rights of the European Union. It should therefore be interpreted and applied in relation to those rights and principles (...)".

The European legislator has attempted to include the fundamental principles that govern and develop the application

10Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance). OJ L 1, 4.1.2003, p. 1-25.

of European sanctions, such as Regulation No. 2988/1995,[11] which in Article 2 created the basis for a European punitive code that provided for the principles of culpability and legality. At the same time, the CJEU stated in this regard:

"(…) Regulation No. 2988/95 established a series of general principles and required that, as a general rule, all sectoral legislation respect these principles (…)".[12]

Towards the path to the guilt principle in the European Union law

In European criminal matters (Hecker, 2021), the recognition of fundamental rights within the Union demonstrates that the ECHR and the CFREU present serious gaps. The guilt principle implicitly refers to the principles of Art. 6 TEU (Kellerbauer, Klamert, Tomkin, 2024), which states:

"(…) guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) resulting from the constitutional traditions common to the Member States, form part of the law of the Union as general principles (…)".

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11 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests. OJ L 312, 23.12.1995, p. 1-4

12 CJEU, C-295/02, Gisela Gerken e Amt für Agrarstruktur Verden of 1st July 2004, ECLI:EU:C:2004:400, I-06369, par. 56. C-94/05, Emsland-Stärke GmbH of 16 March 2006, ECLI:EU:C:2006:185, I-02619. C-420/06, Rüdiger Jager v. Amt für Landwirtschaft Bützow of 11 March 2008, ECLI:EU:C:2008:152, I-01315, par. 61. order in case C-150/10, Bureau d'intervention et de restitution belge v. Beneo-Orafti SA of 21 July 2011, ECLI:EU:C.2011:106, I-07763, par. 69. C-378/18, Landwirtschaftskammer Niedersachsen v. Reinhard Westphal of 3 October 2019, ECLI:EU:C:2019:832, published in the electronic Reports of the cases, par.26.

This is an unacceptable gap in the criminal field and jeopardizes the respect for citizens' freedoms, which risks punishment due to the uncontrollable consequences of their conduct. Thus, the legal traditions of modern Union states constitute the principle of a fundamental right, with no shortage of relevant exceptions. This is a fundamental principle that does not represent a bastion of protection for the freedom of European peoples, but rather the dignity of human person. The time is ripe for harmonization where culpability:

"(…) derecho Fundamental en la Unión Europea anclado en la idea de la dignidad humana y el modelo de Estado democrático de Derecho (…)" (Demetrio Crespo, 2010; Klip, 2021).

In the area of administrative punishment, a glimmer of hope for administrative sanctions has emerged, as well as a certain guarantee of a preventive purpose for the threat of sanctions. As strict liability leads to an inevitable, unpredictable, preventive exemption from sanctions, i.e. price increases, products, and services. A certain lack of attention to the principles is evident, consistent with a limited sensitivity that is reflected in the case law of the European Court of Human Rights, as well as the Court of Justice of the European Union (CJEU) in criminal matters (Hecker, 2021).

The ECtHR case law on the principle of guilt

The ECtHR has addressed liability for the actions of others in a restrictive and punitive way. The first appeals from Switzerland are based on the admissibility of a criminal sanction for the heirs in the event of tax evasion by the deceased. The Court itself stated, in this regard:

"(...) the application of the fine to the heirs constitutes a form of liability for the actions of others in conflict with Art. 6 § 2 ECHR (Tully, 2000; Rainey, Wicks, Ovey, 2021; Villiger, 2023)[13] which establishes the presumption of innocence, but does not recognize the principle of guilt as a principle of culpable personal responsibility and as a fundamental right (...) the legitimacy of certain hypotheses of objective liability, considering them not in conflict with the principle of guilt and in particular with the presumption of innocence, which is the procedural guarantee of the principle of guilt (Art. 6 par. 2 ECHR requires, among other things (...) members of a tribunal do not start from the idea preconceived idea that the accused committed the incriminated act; the burden of proof falls on the prosecution and the doubt benefits the accused (…)".[14]

13ECtHR, 29 August 1997, E.L. and others v. Switzerland, par. 45. A.P. and others v. Switzerland of 29 August 1997.

14ECtHR, Barberà, Messegué et Jabardo v. Spain of 6 December 1988, Série A, vol. 146, par. 33: "(…) the need for an accusatorial process, based on adversarial proceedings and on equality between prosecution and defence, a process in which it is up to the prosecution to "indicate to the interested party what evidence it will use against him-in order to give him the opportunity to prepare and present his defence in this regard-and to provide sufficient evidence to support a declaration of guilt (…)". Allenet de Ribemont v. France of 10 February 1995, par. 35. Asan Rushiti v. Austria of 21 march 2000, par. 106: "(…) presumption of innocence aimed at protecting the accused against any judicial decision or other declaration by state agents which correspond to a declaration of guilt, before a person has been judged and found guilty of a crime (even a reason, in the context of an acquittal, which suggests that the judge considers the interested party guilty is considered sufficient) (…)". Daktaras v. Latvia of 10 October 2002, par. 41. X v. Italy of 28 November 2002. A.L. v. Germany of 28 April 2005, par. 31. Vostic v. Austria of 31 October 2002, par. 19ss. Yassar Hussain

The Salabiaku case, which referred to Article 392 of the French Customs Code (Jeandidier, 1991),[15] concerns the crime committed by an individual possessing prohibited goods while passing in customs without the need to prove the fraudulent negligence of the person in possession of the goods. The court is based on Article 6, par. 2 and does not apply substantive law in a procedural setting but states that:

"(…) it is at its discretion to deprive the judge of merit of a real power of assessment and to empty the presumption of innocence of its substance, if the words (guilt) "legally established" implied an unconditional reference to domestic law (…) art. 6 para. 2 does not ignore the presumptions of fact or law that are found in repressive laws (…) states to contain them within reasonable limits, taking into account the values at stake and preserving the rights of the defence (…)" (Asworth, 1999).[16]

v. The United Kingdom of 7 March 2006, par. 19. Matijaćević v. Serbia of 19 December 2006, par. 45. Panteleyenko v. Ucraine of 12 February 2007, parr. 63ss.

15ECtHR, Salabiaku v. France of 7 October 1988: "(…) Salabiaku also considered Article 369, Article 373, Article 392 and Article 399 of the French Customs Code (…) cannot acquit offenders for lack of intent; the second states that in any proceeding concerning the seizure of goods, the burden of proof that no crime has been committed falls on the person from whom the goods were seized; the third deduces liability for customs evasion from the possession of smuggled goods; the fourth extends the same penalties provided for the perpetrator of the crime to anyone with an interest who has taken part in any way in a crime of smuggling or undeclared import or export (…)". Pham Hoang v. France of 25 September 1992, par. 16, 53.

16ECtHR, Västberga Taxi Aktiebolag and Vulic v. Sweden of 23 July 2002, par. 113. Marandino v. France of 15 April 1991, par. 78. Raimondo v. Italy, 22 February 1994, par. 7. Prisco c.p. v. Italy of 15 June 1999. Madonia v. Italy of 25 march 2003. Andersson v. Italy of 20 June 2002. Arcuri and others v. Italy of 5 July 2001. Riela v. Italy of 4 September 2001, par. 5ss. Bocellari and Rizza v. Italy of 14 September 2011, par. 8. Phillips v. Royaume-Uni of 12 December 2001, par. 32-34. Van Offeren v. The Netherlands of 5 July 2005. Joost Falk against the Netherlands of 19 October 2004, par. 6ss.

The ECtHR recognizes that the provision under investigation does not violate the principle of guilt and the presumption of innocence, as well as a rebuttable presumption of fact. Liability is limited to cases of law that justify the true nature of the matter as the object of the law in question. Thus, the rights of defense are guaranteed as a consolidated interpretation of the law in question.

The rights of defense are guaranteed by French jurisprudence, which allows the accused to demonstrate that he acted under force majeure, even obtaining acquittal, as well as by necessity and on the basis of an unavoidable error. Thus, the Court recognized the right of states to punish based on an objective, material fact without the need to establish criminal intent and/or negligence.[17]

Based on this jurisprudential spirit, it is noted that the court does not abstractly assess provisions that apply to the existence of violations, to guaranteed conventional rights, where the determination by national courts and the element of intent are valued. Thus, the admissibility of evidence exonerating force majeure minimally expresses the subjective nature of the related tort. The presumption of innocence will be safeguarded and:

17ECtHR, Salabiaku v. France, op. cit., par. 15. Västberga Taxi Aktiebolag and Vulic v. Sweden of 23 July 2002, par. 113. Falk v. The Netherlands of 19 November 2004. Janosevic v. Sweden of 23 June 2002. Västberga Taxi Aktiebolag and Vulic v. Sweden of 23 June 2002. Radio France v. France of 30 March 2004. Joost Falk against the Netherlands of 19 October 2004, parr. 6ss.

"(…) guarantees in the procedural ascertainment (with the deduction from the condition of holder of the responsibility for smuggling) (…) (will be) "compensated" with the broadening of the prerequisites of responsibility on a substantial level (…) it is a sort of improper compensation based on a sort of functional equivalence of two very distinct notions of guilt: the substantial one, of reproachability and psychological referability for the violation of the incriminating norm and the procedural one, of achieved ascertainment of responsibility for the contested fact, in the forms provided by law (…)".

It was the European Commission on Human Rights that highlighted the presumptions of guilt, admissible for evidentiary presumptions that allow for the guilt of a given piece of evidence in the specific case. Thus, evidentiary presumptions are rebuttable, reasonable in the face of a danger (Vogler, 1986), which is noted as recognition of the presumption of innocence pursuant to art. 6, letter 2 (Rainey, Wicks, Ovey, 2021). It does not apply substantive law in the procedural context but reiterates that presumptions of fact and law are encountered in repressive laws:

"(…) contained within reasonable limits, taking into account the values at stake and preserving the rights of the defence (…) (Caterini, 2017)[18] requiring a balance between the seriousness of the crime and the rights of the defence (Plowden, Kerrigan, 2002; Jayawickrama, 2002; Esser, 2002; Vogel, 2007; Stumer, 2010; Jackson-Summers, 2012; Cuykens, Holzapfel, Kennes, 2015) (…) dealing with rebuttable presumptions (…) merging the evaluation of compliance with the principle of guilt and the presumption of innocence into the principle of proportionality, in the sense of requiring a balance

18ECtHR, Janosevic v. Sweden, 23 July 2002, par. 101.

between the interests at stake pursued and the right to defence to ensure the proportionate nature of the sacrifice of the presumption of innocence; a balance entrusted to the discretion of the states and whose terms are always rather generic and elastic (…)" (Repik, 1995).

Continuing with the Klouvi v. France[19] case the ECtHR affirmed that due process and the presumption of innocence are contained in the incriminating norm:

"(...) false accusation. According to Art. 226-10 of the French Criminal Code (...) the responsibility for the crime in question lies with the accusers whose accusations were found to be unfounded in the relevant criminal trial (...) in the case of the complaint not being accepted, does not allow to give weight to the proof of the possible "*bonne foi*" of the accusers, not even in the case of acquittal due to insufficient evidence (...) the accusation of sexual violence; while awaiting trial a reform had been introduced (law 07 July 2010) which replaced in the text of art. 226-10 as a prerequisite for the presumption of slander, the formula *déclarant que la réalité du fait n'est pas établie* with a more demanding acquittal for non-existence of the fact (*déclarant que le fait n'a pas été commis*) (…) decision in *bonam partem* is configured as the result of a balancing between different needs for criminal protection, in other words, protecting the appellant not so much as a possible offender, but as a possible victim of violence; this scheme seems in fact to be well suited to the criticism of victim-centrism levelled at the ECtHR (…)".

The compatibility of Art. 6, par. 2 ECHR (Rainey, Wicks, Ovey, 2021) regarding presumptions of fact and law in relation to elements of fact and crime is noted in the G. v. United Kingdom case,[20] where the ECtHR consistently states that the provisions

19ECtHR, Klouvi v. France of 30 June 2011.
20ECtHR, G. v. United Kingdom of 30 August 2011.

of the ECHR and the English law completely and irrelevantly attribute the erroneous perception of the age of a person injured in a sexual assault crime.

The citizen was a fifteen-year-old Englishman and had sexual intercourse with a consenting twelve-year-old girl. During the first meetings, he claimed that the girl was his age. According to section 5 of the Sexual Offences Act of 2003, the protection afforded to children under 13 years of age for the crime of rape, and in the case of vaginal, anal, or oral sexual intercourse, the child's consent and the officer's error as to the person's age were an insurmountable basis. Therefore, the conviction of a thirteen-year-old for rape by national judges at all levels of jurisdiction was a reality that brought the case to the Strasbourg courts.

For this reason, the ECtHR refers to presumptions and assumptions of strict liability that remain within reasonable limits and take into account protected interests while respecting the accused's right to defence as the ECtHR's task to define the constituent elements of the crimes contained in the national criminal law of individual states:

"(...) contracting states remain free to apply the criminal law in relation to any conduct which does not occur in the normal exercise of one of the rights protected by the Convention, and, accordingly, to define the constituent elements of the crime (...) under art. 6, para. 1 or 2 (Rainey, Wicks, Ovey, 2021) dictate the contents of domestic criminal law, including whether or not a blameworthy mental state should be one of the elements of the crime or

whether there should be some particular defence available to the accused in this regard (...) the injured party and the latter's willingness to participate in the sexual activity are not elements of the fact of the crime of rape under section 5 of the Sexual Offences Act; this is to ensure the protection of children from abuse and sexual exploitation, as well as from premature sexual activity – even if consensual. This choice, in the opinion of the Strasbourg judges, does not exceed the limits of reasonableness indicated above (…)".[21]

The ECtHR has repeatedly emphasized the protection afforded by the guilt principle, which endorses an irrelevant solution to the *error aetatis*, which places the possibility of establishing forms of strict liability at the absolute discretion of national legislators. Thus, it is emphasized that this case involves a stigmatizing crime punishable by up to life imprisonment.

In the past, however, strict liability permitted lesser offenses. The *nulla poena sine culpa* principle did not consider that the guarantees surrounding the hard core of criminal law, such as the core of criminal law identified by the ECtHR in the relevant traditional criminal offenses, fully respected the protection, according to the ECHR.

The ECtHR established the presumption of innocence and the guarantee of the principle of guilt in a manner applied to a general offense based on an autonomous conception of criminal law (Teitgen-Colly, 1993; Hetzer, 2006; Ashworth, 2009, Ho,

21ECtHR, G. v. United Kingdom of 30 August 2011.

2019; Horder, 2019).[22] Often, the extension of the principle of guilt of a punitive offense to a constitutional guarantee respects the principle that every European citizen has the power to foresee the related consequences as actions within the scope of liability for punitive offenses regardless of any constitutional protection. Thus, punishment and the presumption of legality in various legal systems of the Member States of the European Union favor administrative acts to the detriment of the recipient of an administrative sanction where the prerogatives require the proof of a public administration and the body draws up the minutes, which affirm the reversal of the burden and the burden of proof on the interested party.

Any repression by the administrative authority does not fulfill the independence and impartiality of the judge, according to Art. 6 ECHR (Rainey, Wicks, Ovey, 2021). It held that this requirement was satisfied by subsequent intervention by an independent and impartial tribunal,[23] which has "a full scope of jurisdiction".[24] If this is the case, the effective recourse of a judge relating to the real powers of control verifies the existence of the validity of the reasons invoking the administration for a

22ECtHR, Öztürk v. Germany of 21 February 1984. Lutz, Englert and Nölkenbockhoff v. Germany of 25 August 1987, par. 22. Sekanina v. Austria ov 25 August 1993, par. 13ss. Minelli v. Italy of 25 March 1983, parr. 34-35. CJEU, C-347/87, Orkem v. Commission of 18 October 1989, ECLI:EU:C:1989:387, I-03283.

23ECtHR, Öztürk v. Germany of 21 February 1984.

24ECtHR, Le Compte, Van Leuven De Meyere v. Belgique of 23 June 1981, par. 4. Belilos v. Switzerland of 29 April 1988, par. 7.

communication of interested reasons that respects the rights of the defense and the review of the proportionality of an imposed measure and/or sanction.

Recognizing the guilt principle through international jurisprudence

The guilt principle in the ECtHR has received extensive investigation and discussion through the Sud Fondi v. Italy case of 20 January 2009, allowing the court to recognize a fundamental right of the guilt principle in this area based on Art. 6 ECHR (Rainey, Wicks, Ovey, 2021; Sudre, 2021). This established the presumption of innocence, which constitutes a procedural aspect of the guilt principle, highlighted in the principle of legality according to Art. 7 ECHR (Sudre, 2021).[25]

The principle of legality and non-retroactivity is emphasized, highlighting the relative predictability of a criminal action that accesses the cognizability of the criminal sanction, requiring compliance with the guilt principle, as well as the predictability of non-culpable conduct that falls outside the control of the agent.[26]

The indispensability of guilt as an implementation of an ordinary system of directives contained in the constitutional

25ECtHR, Sud Fondi s.r.l. and others v. Italy of 20 January 2009.

26ECtHR, Kotlyar v. Russia of 12 July 2022. Kononov v. Latvia of 17 May 2010, par. 185. Mihai Toma v. Romania of 24 January 2012, par. 26.

institution recalls a network that places the values of the human person in a system of implementation and function of absolute guarantee of the principle of legality indispensable for the criminal responsibility of subjective elements.

The ambiguity of criminal law leads criminal law to intervene in criminality as well as safeguard the so-called recipients of criminal law. Thus, the peremptory provisions of the code, for a subject who constantly determines what is permissible and what is prohibited, lead to laws containing recognizable guidelines for behavior.

The principle of guilt is indispensable and constitutes a guarantee for the private individual, both as a free choice of action and as a criminal response to actions that are controllable, to behaviors that precisely produce consequences that are prohibited by law.

Innocent behaviors ignore the precept, guaranteeing, therefore, the reservation of a state law, the peremptory nature of laws, etc. In this case, the subject calls for and responds to facts that minimally impede guilt, the duty to avoid the precept that arises.

The principle of complete guilt constitutes a second aspect of the principle that guarantees the very legality of the rule of law. Thus, the non-retroactivity of a criminal law is unfavorable. It works against arbitrary persecutions that require the calculability of legal and penal consequences of a conduct under the

necessary conditions of free individual self-determination that requires a change in the penal treatment of one's specific case.

The ECtHR has defined the subjective element as a moral link between the material element of an offence and the person considered to be the perpetrator. This is not fully expressed in Article 7 ECHR (Rainey, Wicks, Ovey, 2021), but rather within the logic of a penalty, a punishment that imposes an interpretation of the notion of guilt of the guilty party, paving the way for identifying the element of responsibility for the relevant offence.

The penalty is not justified in an inconsistent manner but requires a foreseeable legal basis that considers a guilty person to be subject to conditions known to criminal law, considering an invincible error that is not necessarily attributable to the person who is the victim.

An intellectual bond entails the logic of a punishment that pursues the re-educational function, including the values offended by those who expressed them, as well as the contempt and indifference and the demand for knowledge of a precept that excludes excusable error, which appears compatible with interpretations after the Sud Fondi ruling.

This is a safeguard that prevents the application of a form of confiscation that is punitive in nature to innocent third parties, enhancing thus the assessment of a precise, inseparable

connection between legality and culpability that guarantees the citizen's freedom according to Art. 7 ECHR (Rainey, Wicks, Ovey, 2021).

This is not a foundation that recognizes, according to the ECtHR, the principle of legality as the point of reference for a norm that requires the application of a punitive intervention. This marks a step forward in the ECHR jurisprudence, which recognizes the full freedom of states to sanction certain acts for the accusation and burden of intentional and negligent conduct.

National legal systems promise, transforming individual domestic courts, while considering the Sud Fondi ruling, leaving out the sanction that falls within the conventional notion of criminal law, namely, as a determination of personal culpable responsibility that does not allow for the application of a determination of the materiality of the offense and the unlawfulness of the act.

The principle of legality according to the ECtHR highlights certain aspects that strengthen the conventional notion of legality, the extension of a sphere of operation, criminal offenses, and the application of qualitative and substantive aspects.

The principle of guilt is recognized through case law, namely from the Varvara case.[27] In this case, the prohibition of liability

27ECtHR, Varnava and others v. Turkey of 29 October 2013.

and the principle of legality are affirmed:

"(...) a consequence of fundamental importance derives from the principle of legality in criminal law: the prohibition of one person if the crime was committed by another (...)";

also referring in the cases A.P., M.P., and T.P. v. Switzerland, heirs punished for crimes committed by the deceased. In the Lagardère v. Frandi case, the court in paragraph 48 reiterates the presumption of innocence according to Art. 6, letter c) ECHR (Villiger, 2023):

"(…) criminal responsibility does not survive the perpetrator of the crime (…) inheriting the guilt of the deceased is not compatible with the norms of criminal justice in a society governed by the rule of law (…)" (Rainey, Wicks, Ovey, 2021).

In the Guzzardi v. Italy case of 6 November 1980, in para. 100 is affirmed:

"(…) the juxtaposition of Articles 6 § 2 and 7 § 1 of the Convention (…) the provision you have just recalled is also valid from the point of view of Article 7 (…) which prohibits the possibility of being held liable in law for an act committed by another. Indeed, if it is true that every person must be able to establish at any time what is permitted and what is prohibited by means of precise and clear laws, it is inconceivable to conceive of a system that punishes those who are not responsible because the person responsible was a third party (…)".

The recognition and prohibition of liability for the actions of others, which guarantees and requires the ascertainment of guilt for the purposes of criminal judgment and liability, is not limited to the application of a punitive sanction:

"(...) conceiving a system in which a person declared innocent or, in any case, without any degree of criminal responsibility ascertained in a guilty verdict suffers a penalty (...) a third consequence of the principle of legality in criminal law: the prohibition of imposing a penalty without ascertaining responsibility, which also derives from Article 7 of the Convention (...)".

This is a principle which affirms the basis of the presumption of innocence in the Geerings and others v. Netherlands case.[28] In the Varnava and others v. Turkey case it is stated:

"(...) the juxtaposition of Article 5 § 1 a) with Articles 6 § 2 and 7 § 1 shows that for the purposes of the Convention there can be no "conviction" without a criminal or, possibly, disciplinary offence being legally ascertained (Engel and Others v. the Netherlands, 8 June 1976, para. 68, Series A no. 22; Guzzardi v. Italy, 6 November 1980, para. 100, Series A no. 39) - just as there cannot be a penalty without establishing personal responsibility (…)" (Sudre, 2021).

The prohibition of liability for the actions of others, the principle of guilt based on art. 6, par. 2, the presumption of innocence and the principle of legality of the court admit the legitimacy of forms of strict liability:

"(...) in principle, to criminally punish an act committed outside the normal exercise of one of the rights protected by the Convention and, therefore, to define the constituent elements of this crime: they can, in particular, always in principle and under certain conditions, make punishable a material or objective fact considered in itself, regardless of whether it is intentional or negligent; the respective legislations offer examples of this (…)".[29]

28ECtHR, Geerings and C. v. The Netherlands of 10 March 2007, par. 17.

29ECtHR, Salabiaku v. France of 7 October 1988, par. 27. Janosevic v. Sweden of 23 July 2002, par. 68: "(…) lack of subjective elements does not necessarily

According to Art. 7ECHR (Rainey, Wicks, Ovey, 2021), it is noted the psychological, intellectual, moral link between the material element of the crime and the person who is considered to be the author.

In the Varnava and others v. Turkey case, recognition was denied. In the Balico S.r.l. case it is concluded that the non-violence of art. 7 imposes a fine on the part of of the appellant who committed a crime without intent and/or negligence.[30]

deprive a crime of its criminal nature; in fact, the laws of the contracting states offer examples of crimes based solely on objective elements (…)". Varvara v. Italy of 29 October 2013: "(…) avoid the feeling that the Varvara judgment constitutes a step backwards in terms of international recognition of fundamental principles of protection inherent in the concept of personal criminal liability: if the interpretation it adopts were to consolidate, thus determining a clear (…) turn with respect to the innovative path started by the second Sud Fondi judgment, it would be necessary to ask what the real added value is (…) it would be limited to banning forms of liability belonging to the origins of criminal law or to pathological-regressive moments in History (…)".

30ECtHR, Valico S.r.l. v. Italy of 23 March 2006, par. 242: "(…) thesis according to which the logic of penalty and punishment as well as the notion of "guilty" (in the English version) and the corresponding notion of "personne coupable" (in the French version) are in the direction of an interpretation of Article 7 which requires, in order to punish, a bond of an intellectual nature. Indeed, as explained in the judgment in Sud Fondi S.r.l. and others (merits, cited above), it follows from the principle of legality of crimes and penalties that criminal law must clearly define crimes and the penalties that repress them, so that the law itself is accessible and its effects are foreseeable. A person under trial must be able to know, starting from the text of the relevant provision and if necessary by means of the interpretation given to it by the courts, which acts and which omissions entail his criminal liability (...) a penalty within the meaning of Article 7 can in principle be conceived only on condition that an element of personal responsibility has been established on the part of the perpetrator of the crime (...) as the Italian Court of Cassation observed in Sud Fondi S.r.l. and Others (see paragraph 112 of the Court's judgment in that case), a clear correlation between the degree of foreseeability of a criminal provision and the degree of personal responsibility of the perpetrator of the crime (…) with the Chamber's conclusions in Sud Fondi S.r.l. and Others that Article 7 requires, in order to punish, an intellectual link which allows an element of responsibility to be precisely identified in the conduct of the perpetrator of the crime (…)".

In the GIEM case, the Grand Chamber favored the conflict between the Sud Fondi and Varnava and others judgments and the guilt principle. In the Sud Fondi judgment, the link between the principle of legality and foreseeability of the sanction, as well as the guilt principle, according to art. 7, require a psychological nature and the element of responsibility of the conduct of a material perpetrator of the same crime.[31]

In the Varnava case, the states depart from a rule that provides for forms of strict liability based on presumptions of guilt by requiring forms of strict liability at a level of presumptions of responsibility that respects the ECHR. This is how the court calls the jurisprudence of Art. 6, par. 2 ECHR (Rainey, Wicks, Ovey, 2021), where the contracting states are free to criminally punish an act committed outside the exercise of the rights protected by the same convention, according to Engel and others v. The Netherlands case of 8 June 1976 (Villiger, 2023).

Par. 81 it defines the constituent elements of a crime that can render material and objective facts punishable, which in themselves constitute criminal intent and negligence. Thus, its legislation respects and exemplifies a legal system that provides for presumptions of fact and law.

These presumptions do not prohibit the ECHR in criminal matters but maintain limits, making it impossible for the

31ECtHR, Valico S.r.l. v. Italy of 23 March 2006, op. cit.

perpetrator to defend himself against the charges against him pursuant to Art. 6, par. 2 ECHR (Maugeri, 2013; Sudre, 2021).[32] Presumptions of guilt procedurally resolve cases involving strict liability that are exceptionally admitted to the ECHR and are essentially rebuttable and allow for a contrary evidence to the exercise of one's right to defense and the defendant. Thus, the principle of guilt is reaffirmed, where the Grand Chamber supports the logic of punishment, the concept of guilt, which corresponds to the support of an interpretation according to Article 7 and the objectives of punishing a mental bond. As for example, in Sud Fondi S.r.l. case it is noted that:

"(…) the principle that offences and sanctions must be provided for by law implies that criminal law must clearly define the offences and the sanctions with which they are punished, such as to be accessible and foreseeable in its effects (…) requirement is satisfied where the individual can know from the text of the relevant provision and, if necessary, with the assistance of the courts' interpretation thereof, what acts and omissions will make him liable for the offence (…) a measure can be considered a sanction within the meaning of Article 7 only when an element of personal responsibility on the part of the offender has been established (…) clear correlation between the degree of foreseeability of a criminal law provision and the personal responsibility of the offender (…) punishment under Article 7 requires the existence of a mental link through which an element of responsibility can be detected in the conduct of the person who committed the offence (…)".

32ECtHR, Salabiaku v. France of 7 October 1988, parr. 27-28. Janosevic v. Sweden, op. cit., par. 68. Klouvi v. France of 30 June 2011, par. 48.

The ECtHR has valorised culpability as an application of punitive sanctions that respect this principle. In this spirit, the Bundesverfassungericht ruling on the compatibility of the Lisbon Treaty with the German Constitution (Meyer, Hölscheidt, 2003; Callies, 2010; Steinbach, 2010)[33] underlined that:

"(...) the European Union's competences in the field of criminal justice must also be interpreted in a way that satisfies the requirements of the guilt principle. Criminal law is based on the guilt principle, which presupposes the self-responsibility of man, who determines his own actions and can decide on the basis of his free will between lawful and unlawful acts. The protection of human dignity is based on the idea of man as a spiritual-moral being, who aims to determine and develop himself in freedom (BVerfGE 45, 187, 227) (...) and art. 1, co. 1, GG determines the conception of the essence of punishment and the relationship between guilt and punishment (BVerEE 95, 96, 140). The principle that every punishment presupposes guilt thus has its foundation in the guarantee of human dignity under Article 1, paragraph 1, GG (BVerCE 57, 250, 275; 80, 367, 378; 90, 145, l 731) (...) the principle of guilt belongs to the unavailable constitutional identity by virtue of Article 79, paragraph 3, GG, which is also protected from interference by public power exercised at a supranational level (…)".[34]

Recognizing the principle of guilt through the due process

The relevant criminal guarantees of Art. 6 ECHR (Rainey,

33BVERFG, 2BVE 2/08, 30 June 2009: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html Accessed on 18.09.2025.

34BVERFG, 2BVE 2/08, 30 June 2009.

Wicks, Ovey, 2021) and the principle of criminal liability in procedural guarantees and the right to defense have led the ECtHR to recognize the principle of guilt in the criminal sector, which required the relative determination of a subjective element for the purposes of accusation and the events of an anomalous conspiracy, as contemplated by an institution that is noted in the case of Belgian and Luxembourg criminal law, namely the principle of criminal liability (Descamps, 2020) (Art. 475 of the Belgian Criminal Code) (De Nauw, F. Kuty, 2014),[35] as well as the strength of an interpretation of liability for an event that aggravates death applied automatically to the contributors of an original crime of theft, namely violence, threats, robbery, and the material perpetrator that commits such an aggravated theft.

The theory of the *emprunt matériel de criminalité*, as a controversial application, commits and facilitates theft, robbery, homicide assimilated to an aggravating circumstance of an objective nature that does not require and does not establish the individual guilt of the participants in the theft. This is a

35"(…) meurtre commis pour faciliter le vol ou l'extorsion, soit pour en assurer l'impunité, sera puni de la réclusion à perpétuité (…) conditions must exist for the application of Article 475 of the Criminal Code, mention seven of them. First of all, the four constitutive elements of theft committed with violence or threats. Then, the death of the victim of these acts of violence or threats, a causal link between the theft committed with violence or threats and the homicide and, finally, the intention to kill. In short, to qualify a crime as homicide committed to facilitate theft, it is necessary that there is a theft, a homicide, a causal link between them and that the causal link is intended by the perpetrator (…)".

reasonable, precise, and simple solution to a civil theory of risk and liability without fault (Francimont, 1990)[36] that justifies the need to fight organized crime (Renson, 2005) as an expression of the theory of the *re illicita* and the *re illicita omnia imputantur quae sequuntur ex delicto* unacceptable to criminal law and in conflict with the principle of individual criminal responsibility.

The ECtHR in the Göktepe case of 2005 underlined:

"(…) "*emprunt matériel de criminalé"* (...) whose application is in conflict in the concrete case with the adversarial principle (…) "*le fait qu'une juridiction n'ait pas égard à des"* arguments bearing on an essential point and "*entraînant des conséquences aussi sévères doit passer pour"* incompatible with respect to the contradictory nature which is at the heart of the notion of equitable procedures guaranteed by article 6 of the Convention (…)".[37]

The parameter used for the presumption of innocence is based on art. 6, par. 1. From the perspective of respecting the adversarial nature of the indictment, the violation of the presumption of innocence is considered and pronounced, thus highlighting the position of the ECtHR considering the proposal of appeals as a matter before the Supreme Court (Nève, 2005).

In the Delespesse case of 2008[38] it was stated that the previous arguments of the Göktepecase put the theory of *emprunt*

36Francimont affirmed that: "(...) emprunt de criminalité apparaît surtout comme une solution de facilité. S'il se fonde sur la théorie civiliste du risque et de la responsabilité sans faute, il est, en droit pénal, inacceptable (…)".

37ECtHR, Göktepe v. Belgium of 2 June 2005, par. 29.

38ECtHR, Delespesse v. Belgium of 27 March 2008.

matériel de criminalité:

"(...) *expressis verbis* that the theory violates the Convention (...) violates Article 6 of the Convention is the fact of not having been able "to exercise his rights of defence in a concrete and effective manner (...) on a decisive point", with consequent violation of the rights of defence and the principles of fair trial under Article 6, paragraph 1 (...)".

With regard to Luxembourg,[39] the ECtHR's positions placed the actual aggravating circumstances on the application of the theory of the *emprunt matériel de criminalité* to a first-instance court where it was not up to the theory under investigation in *abstracto* but the conviction of the CJEU in the precise case of personal responsibility, that is, an aggravating circumstance that respected the principles of fair trial, the presumption of innocence, as well as:

"(...) criminal responsibility for murder was not automatically established following participation in the predicate offence (...) the assessment of the actual aggravating circumstances is individualised (...) not to be called upon to examine in *abstracto* the compatibility with the Convention of the Luxembourg case law relating to Article 475 of the Criminal Code. Nor does it fall within its competence to substitute its own assessment of the facts and evidence for that of the national courts, a task which falls primarily to domestic law and national courts (...) it appears from domestic decisions that the first-instance and appeal judges have carefully analysed the intentional element level of aggravating circumstance of murder by the appellant. It is true that the trial judges underlined that there was no evidence that the appellant had materially participated in the murder of the victim and qualified

39ECtHR, Haxhishabani v. Luxembourg, of 20 January 2011, par. 40.

the aggravating circumstance of murder as objective. The fact remains that their analysis did not result in the automatic attribution of this aggravating circumstance to the appellant (...) recalling that the trial judges examined, with the utmost attention and on the basis of the contradictory elements discussed before them, the appellant's behaviour and the role he played (...) subjectiveised the aggravating circumstance of murder, reaching the conclusion that the appellant was co-author of the facts that led to the death of the victim (…)".[40]

After the Göktepe case and other similar cases (Kuty, 2011; Hirsch, 2012; Hirsch, 2013)[41] the ECtHR did not condemn and did not identify the assessment of a subjective element therefore it established that:

"(...) n'existe donc pas de responsabilité pénale objective. Nullum crimen sine culpa, nulla poena sine culpa (...)" (Renson, 2005; Colette, Basecqz, 2005; De Hert, Gutwirth, Snacken, Dumortier, 2007; Kuty, 2008).

The jurisprudence is oriented towards an assessment of an element of serious foreseeability as a consequence of a behavior of a subject that:

"(...) the absence of justification, and therefore the existence of a previous *infractionnelle* (...) where necessity, not only that the circumstance *soit prévisible*, but also the consequence of behavior of prevention, that behavior cannot *be faire l'objet de justification* (…)" (Vandermeersch, Rozie, 2017).

A new corollary of the *nullum crimen* emerges, outlining the repercussions of systems that, through consolidated case law, allow for criminal confiscation, the basis for determining the

40ECtHR, Haxhishabani v. Luxembourg, of 20 January 2011, par. 41.
41ECtHR, Iasir v. Belgium of 26 January 2016, parr., 32, 47.

materiality of the offense and the unlawfulness of the act (*Rechtswidriggkeit)*, as well as determining the materiality of the offense and a subjective element. The sufficiency of the objective element of the offense appears as an affirmation of the law according to § 73 StGB.

The commission of an unlawful act (*rectswidrige Tat*), according to the definition of the defining provision of § 11 StGB, functions as the margin of an unlawful act described to the judge (*Tatrichter*). Thus, the hypothesis of choice is affirmed through case law, recalling the measure of confiscation, which provides for the crime to sanction with an accessory manner of the materiality of the offense.

Specifying the cases, as we have seen in Sud Fondi v. In the Italy case, the established principle does not allow a generalization based on the ablative sanction, which cannot provide for the extinction of a crime that extends to the statute of limitations.

In these cases, the legitimacy orders and requires a ruling that establishes liability with the same evidentiary and argumentative standard as the procedural guarantees that require a conviction, as we saw in the Paraponiaris v. Greece case of 25 September 2008.

This case saw the Greek judge apply the principle of equivalent confiscation concurrent with the pronouncement of acquittal due

to the statute of limitations, based on the presumption of innocence disregarded by a judicial decision and in the absence of a legal determination of guilt, which reflects the belief that a judgment of liability reaches a summary outcome, such as a decision to commit a case for trial, similar to a preliminary hearing in a healthy and democratic procedural system.

Predicting punitive intervention: between guilt and legality in ECtHR jurisprudence

In the Contrada v. Italy case,[42] the recognition of the culpability principle, according to the ECtHR, affirms the notion of foreseeability of punitive intervention based on changes in *malam partem* that cannot operate retroactively to the principle of legality, pursuant to Art. 7 ECHR (Rainey, Wicks, Ovey, 2021),[43] which highlights the culpability principle.[44]

42ECtHR, Contrada v. Italy of 14 April 2015, parr. 60, 73ss.

43"(…) provided, in short, that the internalization of that right to the predictability of punishment in which European legality consists (retro, § 3) can only occur on the level of subjective-individual certainty protected "case by case" by art. 5 criminal code, rather than on the level of subjective-impersonal certainty protected by the typicality/specificity of the incriminating norm (which can be said to be compromised also by synchronic hermeneutic conflicts) and by the prohibition of retroactive punishments (which can be said to be violated also in the case of unfavorable overruling) (…)".

44ECtHR, Contrada v. Italy of 14 April 2015, par. 72: "(...) hermeneutic content is relevant. In particular, worsening jurisprudential changes cannot operate retroactively due to the violation in every case of that principle of "foreseeability" which in our culture is included in guilt. Therefore, the inevitably unaware recipient is "excused", but an evolution of the "law applied" to future cases is admitted (…) law

The ECtHR found that the applicant had suffered the relevant conviction and arbitrary treatment by the state that did not respect his freedom to make an informed choice. The Contrada case argued:

"(…) external competition in the mafia is (…) a figure lacking a positivized legal basis (an offence of integral "jurisprudential origin" (…)"[45]

highlights that the jurisprudence of the ECtHR on the quality of the law underlines and establishes:

"(…) foreseeability/recognizability of the precept is a principle that concerns both legality and culpability in a reciprocal interaction of effects (…) these

are actually excused in practice is still a gamble on jurisprudence. However, this "subjectivization of the criminal law" must not constitute an alibi for shifting onto members of society (who are "excused" for) the public responsibilities of laws manipulated or "created" hermeneutically in place of absent or late legislation: it is a critical aspect of jurisprudential law (…) which critically highlights (…) attempt to reduce the case to a form of subjective excuse is a way for national jurisprudence to absolve itself a posteriori, "individualizing" responsibilities and placing them on the member of the community who, Contrada case aside, is the real victim of the retroactive worsening hermeneutic procedures, whether they are mere identifications of new rules or real constructions of new types: even if he is hypothetically completely "guilty" of the facts extensively traced back to an incrimination, this reasoning cannot evidently come into play in this attempt to justify the behavior of public authorities, for whose illegitimacy a legislator who has always failed to integrate or rewrite these rules on associative crimes is clearly co-responsible (…)".

45ECtHR, Contrada v. Italy of 14 April 2015, par. 74 "(…) the "general" legal scheme of external competition, which we had been practicing since the 1960s: it was instead that "special part" competition type that was obscure, and, consequently, the penalty that would follow was not knowable (…) its argumentative "minimalism" and with all its questionable aspects, the Contrada ruling falls within the trend, which was then confirmed in the following years, of the recognition of a strong importance of the jurisprudential component within the European judgment of foreseeability. Indeed, with two aspects of "extremization": on the one hand, the contextual dissolution of the formant of the normative provision, so unusual, however, as to reveal that it was probably a "tactical" choice, aimed at simplifying the motivation (…) the extension of the object of the foreseeability judgment to the *ratio decidendi* of the national judge, which can be seen in the choice to valorise the dating of the jurisprudence on which the conviction was based and its being subsequent to the incriminated conduct, and to eliminate from the judgment pursuant to Art. 7 ECHR the jurisprudential framework contemporary to it (…)".

are distinct levels: the recognizability of the precept is a duty of the state and can vitiate the application of the law on the objective level (…) precept on the subjective level can give rise to an excuse - however objectified and normative like all the causes of exclusion of culpability - only if the profile of objective knowability has not been compromised by original breaches of the state or its organs (…)" (Sudre, 2021).[46]

The recognition of a precept specifies that the state respects the principle of legality and does not violate the principles of legality, precision, specificity, and certainty, both as a prerequisite for criminal liability and for recognizing the actual content of the precepts of the same law. Thus, the objective impossibility of a precept finds and does not burden a citizen's constitution at the limit of personal criminal liability. The ECtHR states in this regard that:

"(…) an individual will be able to place, at the time of deciding whether to act or not, legitimate reliance on the interpretation that the internal judges have provided of that norm, having (…) a precise right not to be surprised ex post by interpretative extensions of that same norm that were not foreseeable *ex ante* (…) regardless of whether these interpretative extensions are compatible with the literal data of the incriminating norm, and whether they can have excellent arguments behind them on a historical, teleological,

46ECtHR, Contrada v. Italy of 14 April 2015, par. 76: "(...) European criminal law, including the continental one, is concerned with guaranteeing the subjective-impersonal predictability of punishment (already on the level of the "objective connotations" of the crime, by the citizen-recipient of average prudence), leaving to the guilt test, and therefore to the rule pursuant to art. 5 of the Criminal Code, the questions that pertain to subjective-individualistic predictability (by that flesh-and-blood accused); therefore, reiterating the prohibition of analogy, and including the jurisprudential formant in the focus of the reliance protected by art. 25, co. 2, of the Constitution, would mean emphasizing its humanistic dimension without undermining the regulatory one (Art. 53ECHR) (...)".

systematic level: what matters, from the point of view of the guarantee under Art. 7 ECHR is only whether the individual could reasonably foresee such extension (…) in which he found himself at the time of the commission of the act (…) in the Pessino case[47] (…) an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation, what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed (…);[48] and in the Alimuçaj case,[49] including the provisions on enforcement (…)".[50]

The guarantees of the principles, enshrined in Art. 7 ECHR, which protect the individual and the risk of arbitrary sentencing proceedings, are examined.

The scope of application is extended to a broad notion of criminal matters under national law, based on Engel's criteria, to the application of the principle of non-retroactivity in *malam partem* and in the law based on the relevant case law.[51] It identifies the quality of legality:

"(...) limited to the specificity of the norm, but also concerning the accessibility and predictability of legal sources and the relevant case law (…)".[52]

The connection between the principle of legality and the culpability of a foreseeable role with the control objectives and the conformity of the principle's sanctioning provisions are

47ECtHR, Pessino v. France of 10 October 2006, par. 33.
48ECtHR, Kafkaris v. Cyorus of 12 February 2018, par. 140.
49ECtHR, Alimuçaj v. Albania of 7 February 2012.
50ECtHR, Del Rio Prada v. Spain of 21 October 2013, parr. 56, 118. Kafkaris v. Cyprus, op. cit., parr. 125-152. M. v. Germany of 17 December 2009, parr. 106-137.
51ECtHR, Pessino v. France of 10 October 2006, parr. 15-37.
52ECtHR, Parmak and Bakir v. Turkey of 3 March 2020, par. 58ss.

demonstrated. The ECtHR has exclusively established that:

"(…) statute law can introduce a crime and establish a penalty[53] (…) statute law as well as case-law" (adopting a typically substantive approach, which, in order to reconcile the needs of the different European legal systems to which the conventional principles must be applied, considers the legal and jurisprudential forms as equivalent sources of criminal law)[54] (…) the notion of law implies certain qualities of predictability and accessibility (…) attributes to the principle of legality the meaning of principle of specificity[55] stating that the law must establish in a clear manner the offence and the sanctions, prohibiting not only analogy but also extensive interpretation[56]

53ECtHR, Achour v. France of 29 March 2006, par. 41. Veeber v. Estonia of 21 January 2003, (N. 2), par. 31. Streletz, Kessler and Krenz v. Germany of 22 March 2001, par. 50. K.H.W. v. Germany of 22 March 2001, par. 45. Coëme and others v. Belgium of 22 June 2000, par. 145. Baskaya and Okçuoglu v. Turkey of 8 July 1999, par. 39.

54ECtHR, Del Rìo Prada v. Spain of 21 October 2013, par. 60: "(…) appears fully aware of the fact that, even in civil law systems, the interpretative component resulting from the development of the judicial bodies cannot in any way be eliminated, and must therefore be taken into consideration in order to ensure compliance with the guarantees provided for by the Convention. Article 7 ECHR, therefore, cannot in any way be read in the sense of limiting the progressive process of clarification and integration of the criminal law carried out by national jurisprudence (…) process that the Strasbourg judges consider necessary to ensure that domestic law meets concrete and changing social needs (…) such evolution does not undermine the guarantees established to protect the individual: and therefore the result of the interpretative process must be consistent with the substance of the criminal offence and at the same time foreseeable (…) given that in the Council of Europe common law systems and civil law systems coexist: the expression "domestic law" (…) does not refer (…) only to national law which finds its foundation in the laws enacted by Parliament, but in general to that which derives from any of the sources of law recognised in the individual legal system, including unwritten law of jurisprudential and even customary origin (...)".

55ECtHR, Parmak and Bakir v. Turkey of 3 March 2020. Kasymakhunov and Saybatalov v. Russia of 14 March 2013, par. 77. Achour v. France of 14 July 2003, par. 42. Streletz, Kessler and Krenz v. Germany of 14 February 2001, parr. 50-57. Tolstoy Miloslavsky v. Royaume-Uni of 13 July 1995, par. 37. Cantoni v. France of 11 November 1996, par. 29. Coëme and Others, op. cit., par. 145. E.K. v. Turkey of 7 February 2002, par. 51. S.W v. United Kingdom of 22 November 1995, par. 36, 41-42. C.R. v. United Kingdom of 22 November 1995, par. 33. Baskaya and Okçuoglu v. Turkey of 8 Kuly 1999, pa.r 36. K.H. W. v. Germany, op. cit., par. 45.

56ECtHR, Veeber v. Estonia, of 22 February 2003, par. 31. Coëme and others, op.

(…) while it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy[57] (…) it must be formulated with sufficient precision to enable the addressees (…) to know in advance, to a reasonable extent under the circumstances of the case, the consequences which flow from the performance of a given conduct (…)[58] the words of the provision in question and, if necessary, with the assistance of the interpretation of the courts, what acts or omissions render him criminally liable[59] (…) confers a certain discretion on the interpreter, is not in conflict with this requirement, if the purpose of the discretion and the manner in which it is to be exercised are indicated with sufficient clarity, having regard to the legitimate aim in question, namely to secure to the individual adequate protection against arbitrary interventions[60] progressive evolution of the criminal law through judicial interpretation is a necessary part of the legal tradition, provided that the results of such interpretative development are in

cit., par. 145. Kokkinakis v. Greece of 25 May 1993, par. 52. Larissis and others v. Greece of 24 February 1998, par. 39ss. Streletz and others, op. cit., par. 50. K.H.W. v. Germany, op. cit., par. 45; Baskaya and Okçuoglu v. Turkey, op. cit., par. 36.

57ECtHR, Parmak and Bakir v. Turkey of 3 March 2020, par. 58.

58ECtHR, Tolstoy Miloslavsky, op. cit., parr. 71-72.

59ECtHR, Parmak and Bakir, op. cit., par. 58. G.I.E.M. S.R.L. and others v. Italy of 28 June 2918, par. 242. Achour v. France, op. cit., par. 41. Veeber v. Estonia, op. cit., par. 31. Streletz and others v. Germany, op. cit. K.H. W. v. Germany, op. cit., par. 45. Coëme and others, op. cit., par. 145. Baskaya and Okçuoglu v. Turkey, op. cit., par. 36. we see all these cases referred in the conclusions of the Advocate General J. Kokott in case: C-308/06, The International Association of Independent Tanker Owners and others of 20 November 2007, ECLI:EU:C:2007:689, I-04057, par. 104.

60ECtHR, Tolstoy Miloslavsky, op. cit., parr. 71-72. Coëme and others, op. cit., par. 145. Grigoriades v. Greece of 25 November 1997, par. 301. Goodwin v. Royaume-Uni, op. cit., par. 496ss. Margareta and Roger Andersson v. Sweden of 25 February 1992, par. 75. 2 agosto 1984, Malone v. United Kingdom of 2 August 1984, par. 66. Huvig v. France of 24 April 1990, parr. 52-54ss. Kruslin v. France of 24 April 1990, parr. 20-22ss. Sunday Times v. United Kingdom of 26 April 1979, par. 30. Ivica Kevesevic v. Russia of 15 July 1998. Cases that concluded in the conclusions of the Advocate General Yves Bot in case: C-76/06 P, Britannia Alloys & Chemicals Ltd of 1st March 2007, ECLI:EU:C:2007:128, I-04405, par. 135.

accordance with the essence of the crime and can be reasonably foreseen (…)".[61]

It is clear that the recognition of the principle of specificity and the guarantor of the citizen's freedom precisely knows the boundary between lawful and unlawful, which is oriented towards the consequences of one's conduct, where the foreseeability and pre-calculability of a sanctioning state intervention[62] respects the principle of guilt and guarantees the *nullum crimen* as a guarantee of the principles of specificity and determinacy.[63]

The principle of non-retroactivity, as an incrimination, guarantees the accessibility and predictability of a criminal intervention that respects the principle of a fundamental role of a specific normative datum that does not allow for a precise application in Kotlyar v. Russia, a case where the ECtHR

61ECtHR, Streletz and others v. Germany, op. cit., par. 50. K.H.W. v. Germany, op. cit., par. 45. Kafkaris v. Greece, op. cit., par. 141. Parmak and Bakir v. Turkey of 3 March 2020, par. 59: "(…) article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (…)". See also the case: Parmak and Bakir v. Turkey of 3 March 2020, par. 58: "(…) "the theme of identifying an "essence" of the criminal offence calls for the attention of the criminal lawyer with respect to the identification of its content, since this criterion can be seen as a reference to the search for the limits of the criminal "type" and therefore an appeal to a tendentially restrictive interpretation of the incriminating norm (…) one could even imagine a role for the ECHR as a sentinel of the needs to contain the expansive vocation of national jurisprudence (…)".

62ECtHR, Veeber v. Estonia, op. cit., par. 31. Coëme and others, op. cit., par. 145. Kokkinakis v. Greece, op. cit., par. 52. Streletz and others, v. Germany, op. cit., par. 50. K.H. W. v. Germany, op. cit., par. 45. Baskaya and Okçuoglu v. Turkey, op. cit., par. 36.

63ECtHR, Streletz and others v. Germany, op. cit., par. 50. K.H.W. v. Germany, op. cit., par. 45.

contested the retroactive application of a provision in the matter, highlighting and confirming the invalidity of a conduct punishable under another title.[64]

Evaluation and predictability: between objective and subjective parameters

The ECtHR has judged the criminal law to be a reconstruction of a confusing[65] and even contradictory legislative context (Grabewarter, 1997).[66]

Jurisprudential expertise and guidance clarify the objective context imposed as an ideal model that recognizes the ECtHR's existence and the related burden of an express examination of the legislation accustomed to the practice of its profession.

The subjective dimension of the judgment of legality, within a traditional penal dogma and a framework of a guilt judgment, is fundamentally valued as a precondition for a punitive reprimand of the knowability of the criminal law.[67]

Objective parameters are part of an evolutionary multicultural context,[68] unconnected with normative references, the formal

64ECtHR, Kotlyar v. Russia of 12 July 2022.

65ECtHR, Kafkaris v. Greece, op. cit., par. 146 ss.

66ECtHR, Pessino v. France of 12 February 2007, par. 33. Flinkkila and others v. Finland of 6 April 2010, par. 67. 19 February 2008, Bartosevicius and Burokevicius v. Lithuania of 19 February 2008, par. 120. Custers, Deveaux and Turk v. Denmark of 3 August 2007, par. 94. Groppera Radio AG and others v. Switzerland of 28 March 1990, par. 60.

67ECtHR, K.H.W v. Germany, op. cit.

68ECtHR, Kuolesis and others v. Lithuania of 18 February 2008, par. 115 ss. C

nature of marital rape,[69] and a model of objective recognizability. An independent parameter for evaluating the concept of social predictability for the Court is the:

"(…) evolution of the social consideration of behaviour as unlawful, considering the incrimination to be predictable even if it conflicts with a normative text with a liberating tone and even in the absence of objective

69ECtHR, S.W. v. United Kingdom of 22 November 1995, par. 42-43ss: "(…) be observed that a crucial issue in the judgment of the Court of Appeal in R. v. R. (summarised at paragraph 11 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it (…) "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, 86-87, para. 37) (...) no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 12 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (…) the decisions from the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (…) no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (…) the essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords– that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim-cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (…) the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom (…)".

guiding indicators (…)".

It is allowed the retroactive application of a *malam partem* interpretation to a perspective that considers the victim and the guarantees of an offender within an ambiguous spirit that tolerates imprecise norms.

The judicial interpretation seeks to consolidate, as in the Kokkinakis v. Greece case of 1993, the conviction of Jehovah's Witnesses for proselytism based on the norm of the ECtHR, which considers the attribution of a conduct to be effective, precise, and varied.[70] The risk and presence of similar events and notions emerging in appeals for violations of art. 7 is evident in the Soros v. France case.[71]

In the case of marital rape, the ECtHR guarantees respect for the fundamental rights of the person by welcoming the marital relationship of a civil society that considers that:

"(…) banishment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom (…) the consideration that the British judge's

70ECtHR, Cantoni v. France, op. cit.

71ECtHR, Soros v. France of 6 October 2011, parr. 56-57: "(…) criminal relevance of the conduct attributed to the appellant (stock market transactions on securities issued by a banking institution with which the appellant, a well-known institutional investor, had no relationship of any kind) at the time of the facts had already been found by case law, albeit only at the level of the courts and with regard to events involving different types of individuals (these were two cases concerning, respectively, a financial journalist and a consultant and director of an architectural firm) "sufficiently similar" to that of the appellant; this, despite the fact that, according to the ECHR, the incriminating provision, which in the Soros case had been

ruling, in a sense "consistent with the essence of the crime (…) continues a perceptible line of jurisprudential development" on the path of placing increasingly marked limits on marital immunity (…) judicial recognition of the absence of immunity had become a reasonably foreseeable development (…)".[72]

Within this spirit, the CJEU intervenes with greater attention to the subjectivity of the precept's knowledge and to a greater concentration of the evaluation of the foreseeability in objective terms and of its specificity, typicality of the incriminating case independently of the subjective peculiarities of the recipients of the precept as recipients of elements that finalize a judgment[73] within a regulatory framework of objective consistency:

"(...) they are accustomed to having to exercise great caution in the exercise of their profession (...) can therefore expect them to pay particular attention in the evaluation of the risks that it entails (…)".[74]

applied for the first time against a person not linked either contractually or professionally to the company in which he had acquired shares, was in fact not very precise in outlining the requirements of the so-called insider and the "privileged" nature of the information used (…)".

72ECtHR, S.W. v. United Kingdom of 22 November 1995, par. 23-27, 43: "(...) the Crown Court, in sentencing a husband who had appealed to the cause of non-punishability, had conformed to other cases, albeit characterised by a variety of circumstances relating to the evolution of the marital status of the subjects involved (separation, cessation of cohabitation, etc.), in which the immunity exception had not been accepted, the English Court having grasped the changed conceptions of equality between men and women and the need to protect the dignity of the latter even within the marriage bond (…)".

73ECtHR, Cantoni v. France, op. cit., par. 35.

74ECTHR, Soros v. France of 6 October 2011, par. 53. KA and AD v. Belgium of 27 January 2015. Milankovic v. Croatia of 20 January 2022, parr. 64-66. "65. That is especially so in the applicant's case having regard to: the fact that he was a police commander, and that persons carrying out a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails (…) the domestic courts' finding that the applicant was a military-academy-educated officer who had thus known very well that his conduct could make him criminally liable (…) the fact that

In the Navalnyye v. Russia case,[75] the violation of Art. 7 ECHR has a political criminal procedural basis, which deprives it of the foundations and guarantees provided by the ECHR.

The criminal conviction and the result of a broad interpretation of the criminal law do not include the contractual law aspect that integrates the crime of commercial fraud and the use of proceeds integrated with the crime of money laundering.

The violation of Art. 7 ECHR is also ascertained in the Aleksey Navalnyy case.[76]The total incompatibility of conduct that challenges the defendant and the incriminating provision with arbitrary criminal proceedings occurs according to Art. 6, par. 1 ECHR.

The justification of ignorance of the law as a guideline of jurisprudence contrasts with the situation of linear

Croatia's declaration of independence had been adopted already on 25 June 1991 even though it came into effect only on 8 October 1991 (…) considerations are sufficient to enable the court to conclude that the applicant's conviction for war crimes on the basis of his command responsibility had *tempore criminis* a sufficiently clear legal basis in international law (…) and that it was foreseeable for him that his failure to prevent the war crimes committed by the police units under his command would make him criminally liable (…) these considerations that this conclusion applies regardless of whether those crimes were committed before or after the war in Croatia in the early 1990s became an international armed conflict (…)". Georgouleas and Nestoras v. Greece of 28 May 2020: "(…) the conviction (with an administrative sanction) for stock market manipulation was identified not only in the presence of compliant precedents and in the adequacy of the interpretation adopted by the National Court to the essence of the case, but also in the peculiar professional role of the appellants, who, being expert financial operators, should have used their skills to avoid entering areas of sanction risk (the personal qualifications support a solution already identified aliunde on an objective basis – existence of precedents and conformity of the chosen interpretation to the essence of the case) (…)". See also the case: Kononov v. Latvia of 17 May 2010, par. 235ss. Drelingas v. Lithuania of 9 September 2019, par. 97ss.

75ECtHR, Navalnyye v. Russia of 17 October 2017.

76ECtHR, Navalnyy and Ofitserov v. Russia of 4 July 2016.

blameworthiness, which evaluates the subjective, exceptional factors that make knowledge of the law non-required for a dutiful action and a situation that lacks the typicality of the fact in the law in action. Thus, the *nullum crimen* and the guarantee of the knowability of the criminal precept are limited offering to individuals the renunciation of a punishment system for guilt as well as ignorance of the criminal law.

The remedy survives, and the criminal law, as a cause of ignorance, finds itself in a gaping and obscure environment where ambiguity and imprecision present themselves as flaws that determine the constitutional illegitimacy of each member country of the Union, thus constituting a lower-level guarantee as a sort of remedy to an effective instance that operates and ensures the principle of legality in criminal matters as a corollary of a precision that the prohibition of analogy as the capacity to render the *nullum crimen* appears to be a trivial matter.

A varied interpretation of the ECHR, in line with its conformity, includes the concept of an element of law, as capable of overcoming the preclusion of a jurisprudential change that assumes a stable character according to contemporary, global, and domestic law.

What is the role of the CJEU?

The connection between the principle of legality and culpability demonstrates the role of predictability and compliance with EU sanctions. The culpability and a punitive intervention presupposes behaviors that are controllable by the individual and the perpetrators. Thus, uncontrollable behaviors find no boundary between unlawful and lawful.

The principle of legality, according to the conclusions of the Advocate General Ruiz Jarabo Colomer in the joined cases C-74/95 and C-129/95, is common to traditions of a constitutional nature for the member states.

At the same time the fundamental rights of the citizens of these states are based on the basic principle of the law of the Union itself,[77] which constitutes an emanation of the principle of legal certainty. It is a recognition of a general principle of the Union[78]

77CJEU, joined cases: C-74/95 and C-129/95, X, of 12 December 1996, ECLI:EU:C:1996:491, I-06609. C-308/06, Intertanko and others of 3 June 2008, ECLI:EU:C:2008:312, I-04057, par. 70. C-309/06, Marks & Spencer of 10 April 2008, ECLI:EU:C:2008:211, I-02283, par. 21. Joined cases: C-74/95 and C-129/95, X, of 12 December 1996, ECLI:EU:C:1996:491, I-06609. C-303/05, Advocaten voor de Wereld of 3 May 2007, ECLI:EU:C:2007:261, I-03633, parr. 49, 100ss. C-266/06 P, Evonik Degussa GmbH, già Degussa GmbH v. Commission and Council of 22 May 2008, ECLI:EU:C:2008:295, I-00081. C-384/02, Knud Grøngaard-Allan Bang of 22 November 2005, ECLI:EU:C:2005:708, 09939, par. 28. T-279/02, Degussa v. Commission of 5 April 2006, ECLI:EU:T:2006:103, II-00897, par. 67.

78CJEU, joined cases C-383/06 to C-385/06, Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening of 13 March 2008, ECLI:EU:C:2008:106, I-01561, par. 52. C-70/83, Kloppenburg of 22 February 1984, ECLI:EU:C:1984:71, I-01075, par. 11. joined cases C-212/80 to C-217/80, Meridionale Industria Salumi and others of 12 November 1981, ECLI:EU:C: 2010:1981:270, I-02735, par. 10. T-41/99, T-142/99, T-150/99 to T-151/99, Vela Srl-Tecnagrind SL of 7 November 2001, ECLI:EU:T:2002:43, II-00585, par. 39ss. See also the conclusions of the Advocate General Ruiz-Jarabo Colomer in case: C-110/03, Belgium v. Commission of 16

which guarantees the predictability of situations and relationships of a legal nature that fall within the scope of the law of the European Union (Chalmers, Davies, Monti, Heyvaert, 2024).[79]

The principle reconstructs in the law of the Union its corollaries which are constituted by the reserve of law, the principle of non-retroativity, the prohibition of analogy in *malam partem* and the principle of specificity.

The principle of legality recognizes in the CFREU and in art. 49 the principle of legality and applies to proceedings which have a criminal nature of investigation at the CJEU according to the Engel criteria established by the ECtHR itself as a legal qualification in the law of the Union and in the nature of the third degree offence as severity of the sanction.[80]

December 2001, ECLI:EU:C:2001:223, I-02801, par. 59ss.

79GC, joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. Of 6 October 2005, ECLI:EU:T:2005:349, II-04065, par. 80. C-63/93, Duff and others of 15 february 1996, ECLI:EU:C:1996:51, I-00569, par. 20. C-137/85, Maïzena v. Balm of 18 November 1987, ECLI:EU:C:1987:493, I-04587. C-117/83, Könecke v. Balm of 25 September 1984, ECLI:EU:C.1984:288, I-03291. T-65/04, Nuova Gela Sviluppo v. Commission of 27 June 2007, ECLI:EU:T:2007:189, II-00068, par. 69. T-206/00, Hult v. Commission of 31 January 2002, ECLI:EU:T:2002:2, II-00081, par. 38. C-304/94, Tombesi and others of 25 June 1997, ECLI:EU:C:1997:314, I-03561. C-107/76, Hoffman-La Roche AG v. Centrafarm Vertiebsgesellschaft Pharmazuetischer Erzeugnisse mbH of 24 May 1977, ECLI:EU:C:1977:89, I-00957, par. 66.

80CJEU, C-554/19, Ecotex Bulgaria of 6 October 2021, ECLI:EU:C:2021:803, published in the electronic Reports of the cases, par. 91-92. conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, ECLI:EU:C:2002:865, published in the electronic Reports of the cases, par. 26-27: "(…) it is common ground that the pecuniary sanction in question is connected to an offence provided for and sanctioned by Article 255 of the Criminal Code, pursuant to which the representative of the company Delta Stroy is subject to criminal proceedings; this sanction is also defined in Articles 83a et seq. of the ZANN, these

The principle of non-retroactivity and criminal law provisions are common to the legal systems of the Member States according to Art. 7 ECHR. They are integral parts of the general principles of EU law, which guarantees compliance[81] and enhances the profile that guarantees the predictability of a punitive intervention. They also specifying the principle that:

"(…) oppose the retroactive application of a new interpretation of a rule describing an infringement, a jurisprudential interpretation the result of which was not reasonably foreseeable at the time an infringement was committed, in light, in particular, of the interpretation in force at that time in the jurisprudence relating to the legal provision in question (…)".[82] In the CJEU the rationale for the guarantee and the principle of non-retroactivity in the criminal sector consists in: "(...) citizens knowing in advance the conduct

provisions falling within Chapter 4 entitled "Administrative sanctions of a criminal nature against legal persons and individual entrepreneurs" (…) sanction is pronounced by a criminal judge at the end of proceedings governed by Article 83b and Articles 83d to 83f of the ZANN, it being understood that the subsequent Article 83g provides, for matters not regulated by the provisions in question, the application of the Code of Criminal Procedure. 28. According to the information provided by the referring court, the pecuniary sanction is intended to punish the offence and prevent its commission and not to compensate for the damage caused by it, which is indicative of a repressive purpose typical of a criminal sanction within the meaning of Article 49 of the Charter (…) severity of the sanction in question, as stated, its maximum amount is set at BGN 1 000 000 (approximately EUR 510 000), which confirms the analysis according to which it is a criminal sanction within the meaning of Article 49 of the Charter. 29. The sanctioning regime provided for by the national legislation at issue in the main proceedings is therefore, in my view, of a criminal nature and can therefore be assessed in the light of the fundamental rights guaranteed by the Charter and, in particular, of the principle of legality of offences and penalties enshrined in Article 49 thereof (…)".

81CJEU, C-63/83, Kirk of 10 July 1984, ECLI:EU:C:1984:255, I-02689, par. 22.

82CJEU, C-3/06, Groupe Danone v. Commission of 8 February 2007, ECLI:EU:C:2007:88, I-01331, par. 90. joined cases C-189/02 P, C-202/02 P, from C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and others v. Commission of 28 June 2005, ECLI:EU:C:2005:408, I-05425, par. 227. C-194/14, AC-Treuhand AG of 22 October 2015, ECLI:EU:C:2008:717, published in the electronic Reports of the cases, par. 142.

from which they must abstain and the consequences that derive from it (*lex previa*) (…)".[83]

The principle of specificity and legal certainty is noted in the jurisprudence, as a fundamental principle of Union law.[84] The rule seeks to apply and foresee what is submitted[85]:

"(…) Community legislation should be clear and precise, so that individuals can know their rights and obligations without ambiguity and act accordingly (...)[86] the principle of certainty and predictability of the rules involving sanctions (…) a sanction, even if not of a criminal nature, cannot be inflicted unless it is based on a clear and unambiguous legal basis (…) (Heitzer, 1997)[87] rigorous and unequivocal definition of the types of crimes (*lex certa*), so that citizens, on the basis of this definition and, where necessary, with the assistance of the courts, are able to foresee the actions and omissions that

83CJEU, C-303/05, Advocaten voor de Wereld of 3 May 2007, op. cit., par. 102.

84CJEU, C-94/05, Emsland-Stärke GmbH of 16 March 2006, op. cit., par. 43. joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. of 6 October 2005, op. cit., par. 80. joined cases C-369/96 and 376/96, Arblade and Leloup of 23 November 1999, ECLI:EU:C:1999:575, I-08453.

85GC, T-115/94 Opel Austria GmbH v. Council of 22 January 1997, ECLI:EU:T:1997:3, II-00039. See also the conclusions of the Advocate General Lèger in case: C-315/96, Lopex Expert v. Hauptzollamt Hamburg-Jonas of 29 January 1998, ECLI:EU:C:1998:31, I-00317.

86CJEU, C-158/06, Stichting ROM-projecten and Staatssecretaris van Economische Zaken of 21 June 2007, ECLI:EU:C:2007:307, I-05103, par. 25. C-110/03, Belgium v. Commission of 14 April 2005, ECLI:EU:C:2005:223, I-02801, par. 30. C-143/93, Gebroeders van Es Douane Agenten / Inspecteur der Invoerrechten en Accijnzen of 13 February 1996, ECLI:EU:C:1996:45, I-00431, par. 27. C-368/89, Crispoltoni of 11 July 1991, ECLI:EU:C:1991:307, I-03695. joined cases 66, 127 and 128/79, Amministrazione delle Finanze v. Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi of 27 March 1980, ECLI:EU:C:1980:101, I-01237, par. 9.

87CJEU, C-117/83, Könecke v. Balm of 25 September 1984, op. cit., par. 11. C-292/83, Merck v. Hauptzollamt Hamburg-Jonas of 15 December 1999, ECLI:EU:C:1999:326, I-03663, par. 56. C-248/04, Koninklijke Coöperatie Cosun of 26 October 2006, ECLI:EU:C:2006:666, I-10211, par. 79. T-198/03, Bank Austria Creditanstalt AG v. Commission of 30 May 2006, ECLI:EU:T:2006:136, II-01429. Conclusions of the Advocate General Yves Bot in case: C-76/06 P, Britannia Alloys & Chemicals Ltd of 1st March 2007, op. cit., parr. 123.

compromise them criminally (…)".[88]

In the cases Prokuratura Rejonowa v. Słupsku[89] and in BV[90] the CJEU in terms of legality, foreseeability has established, privileged the relationship of legality and guilt, according to which:

"(...) the law clearly defines the infringements and the penalties that repress them (...) is satisfied if the subject is able to know, on the basis of the wording of the relevant provision and with the help of the interpretation given to it by the courts, which acts and omissions imply his criminal liability (...)[91] the principle of legality of offences and penalties cannot therefore be interpreted as a prohibition of gradual clarification (...) of the rules on criminal liability by a jurisprudential interpretation, provided that the result is reasonably foreseeable at the time of the commission of the infringement, in the light of the interpretation in force at that time, in the jurisprudence relating to the legal provision in question (…)".

The Advocate General Bobek stated that:

"(…) the legislator was not able to indicate unequivocally what it wanted, it is complicated to do so *a posteriori* by way of interpretation, especially since

88CJEU, C-170/08, H.J.Nijemeisland v. Minister van Landbouw, Natuur en Voedselkwaliteit of 11 June 2009, ECLI:EU:C:2009:369, I-05127.

89CJEU, C-634/18, Prokuratura Rejonowa w Słupsku, Prokuratura Rejonowa w Słupsku of 1 June 20020, ECLI:EU:C:2020:455, published in the electronic Reports of the cases, par. 49.

90CJEU, C-570/20, Direction départementale des finances publiques de la Haute-Savoie of 5 May 2022, ECLI:EU:C:2022:348, parr. 37ss.

91CJEU, C-194/14, AC-Treuhand AG of 22 October 2015, op. cit., par. 40. C-102/16, Vaditrans of 20 December 2017, ECLI:EU:C:2017:1012, published in the electronic Reports of the cases, par. 51. Conclusions of the Advocate General M. Campos Sánchez-Bordona, C-570/20, Direction départementale des finances publiques de la Haute-Savoie of 9 December 2021, ECLI:EU:C:2021:992, published in the electronic Reports of the cases, par. 62. C-906/19, Ministère public (Sanctions extraterritoriales) of 4 March 2021, ECLI:EU:C:2021:178, published in the electronic Reports of the cases, par. 53.

the persons concerned could reasonably have followed a different path of thought (…) it becomes all the more problematic if it must actually result in the sanctioning of behaviors, by analogy or by connection, without an explicit legal basis (…) the crimes must be defined ex ante in a precise and clear manner (in the case in question) taking into account the literal wording of Article 19, paragraph 2, of Regulation no. 561/2006,[92] the repression of infringements, on the basis of that provision, of Regulation no. 3821/85, detected but not committed on the territory of a Member State can certainly not be considered reasonably foreseeable by the person who suffers the consequences (…)".[93]

The conclusions of the Advocate General M. Campos are also of the same spirit of thought. Sánchez-Bordona underlined:

"(…) the provisions that authorise double repression must respect certain requirements of accessibility and predictability (…)".[94]

In the BV case,[95] the need for reasonable foreseeability of a relative interpretation of criminal liability is affirmed, which provides criteria for the evaluation and predictability of an

92Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (Text with EEA relevance) – Declaration. OJ L 102, 11.4.2006, p. 1-14.

93CJEU, C-906/19, Ministère public (Sanctions extraterritoriales) of 4 March 2021, op. cit., parr. 54-56.

94CJEU, C-906/19, Ministère public (Sanctions extraterritoriales) of 4 March 2021, op. cit., 62.

95CJEU, C-906/19, Ministère public (Sanctions extraterritoriales) of 4 March 2021, op. cit. par. 39: "(…) double repression, or rather the cumulation of criminal proceedings and sanctions, must respect "the principle of legality of offences and penalties as guaranteed in Article 49, paragraph 1, of the Charter (…) in terms of foreseeability in the light not only of "legislative provisions", but also of "their interpretation by national judges", requiring that the result of such a gradual clarification of the rules on criminal liability through jurisprudential interpretation be reasonably foreseeable at the time the infringement was committed (…)"

interpretation where it is specified:

"(...) the extent of the foreseeability thus required depends largely on the content of the text in question, the sector concerned and the number and quality of its addressees (...) foreseeability of the law does not prevent the interested party from being led to resort to an enlightened legal opinion in order to evaluate, to a reasonable extent based on the circumstances of the case in question, the consequences that may result from a given act (...) professionals, accustomed to having to demonstrate great prudence in carrying out their work (...) take particular care in assessing the risks that it entails (…)".[96]

The principle of legality provides that the sanction cannot be applied unless introduced by an act of the Union, i.e. the reserve of law and of the irregularity, that is, the principle of non-retroactivity. This is how the principle of exhaustiveness of an administrative case law of the Union is interpreted, which imposes a precise and unequivocal legal basis.[97] The CJEU has specified that this discipline is applied only to administrative sanctions and not to measures that seek to repair, according to Art. 4 of the Regulation,:

"(...) an "integrated" meaning which includes the relevant constitutional and supranational sources (...) constitute clear and unequivocal normative bases of the principle of predictability of the judicial decision (...) also including

96CJEU, joined cases C-189/02 P, C-202/02 P, from C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and others v. Commission of 28 June 2005, op. cit., C-194/14, AC-Treuhand AG of 22 October 2015, op. cit., par. 42. C-72/15, Rosneft of 28 March 2017, ECLI:EU:C:2017:236, published in the electronic Reports of the cases, par. 196.

97GC, T-199/99, Sgaravatti Mediterranea Srl of 26 September 2002, ECLI:EU:T:2002:228, II-03731, par. 12.

the predictability of the penalty that may be imposed and executed (…)".[98]

The issue of guilt in the CJEU

The CJEU, drawing inspiration from the Sud Fonti case of the ECtHR and the restrictions on the guilt principle under Article 6, where reasonable limits are presented,[99] are confirmed by the Advocate General Van Gerven in the Hansen case, who sought to exclude the configuration of criminal offences based on strict liability, which simply limits and requires respect for the rights of the defence.[100]

This is a position taken by the Advocate General Stix-Hackl in the Käserei Champignon case, where financial interests are involved that impose facilitations of the burden of proof, the waiver of the prerequisite of guilt.[101] She stated:

"(...) in the area of administrative sanctions, it is not possible to infer from Article 6, paragraph 2, of the EU Treaty, in conjunction with the European Convention on Human Rights, the recognition of the guilt principle as a

98CJEU, C-286/05, Reinhold Haug and Land Baden-Württemberg of 4 May 2006, ECLI:EU:C:2006:286, I-04121, par. 18ss. Conclusions of the Advocate General P. Lèger in case: C-295/02, Gisela Gerken e Amt für Agrarstruktur Verden of 11 December 2003, ECLI:EU:C:2003:400, I-06369, par. 23ss.

99ECtHR, Salabiaku v. France, op. cit., par. 15. Västberga Taxi Aktiebolag and Vulic v. Sweden of 23 July 2002, par. 113. Raimondo v. Italy of 22 February 1994, par. 7. Prisco c.p. v. Italy of 5 June 1999. Madonia v. Italy of 25 March 2003, par. 4. Andersson v. Italy of 20 June 2002, par. Riela v. Italy of 4 September 2001, parr. 5-6. Phillips v. Royaume-Uni of 12 December 2001, parr. 32-34. Van Offeren v. The Netherlands of 5 July 2005.

100See the conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, ECLI:EU:C:2001:645, I-06453, par. 52.

101CJEU, see the conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 79.

general principle of Community law (…)".[102]

The CJEU, through the influence of the ECtHR, has accepted the principle of personality and criminal liability as a reference to the infringement behavior of a responsible subject, where the prohibition of liability of others is transposed into European law as a *nulla poena sine culpa* and as a principle of culpability.

In the Valsabbia case, the CJEU took into consideration the use of conditions that recognise the relative relevance of force majeure given that the intervention of an extraordinary event:

"(…) has unavoidable consequences, to the point of making it objectively impossible for the interested parties to fulfil their obligations (…) the requirement that the unlawful conduct can be attributed to the person held responsible and that, in the absence of such "attributability", subjection to the sanction, in accordance with the principle of personal responsibility, must be excluded (…)".[103]

In the Hansen case, the criminal law of the Kingdom of Denmark established strict liability for employers and for violations committed by employees themselves.

The CJEU attempted to a system based on the Danish national law and to the workplace the violation committed. It is recognized that positive effects, such as a general prevention, derived from the provision of a form of liability that induces the employer of a company to guarantee the relevant rules

102CJEU, see the conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 79.

103CJEU, joined cases C-154, 205, 206, 226- 228, 263, 264/78, 39, 31, 83 and 85/79, Valsabbia v. Commission of 18 March 1980, ECLI:EU:C:1980:81, I-00907.

(Tiedemann, 1983)[104] and the imposition of sanctions that are independent of evidence. Culpability in a disproportionate manner respects the pursued objective, as well as sanctions of strict liability that evaluate the form of impact of rights in accordance with the principle of proportionality.[105]

The problem of subordination and the principle of culpability requires the general prevention of domestic law that is absolutely binding.[106]

The forms of objective liability ambiguously limit and take into consideration, as a subjective element, good and bad faith, after an evaluation of the conformity of the principle of proportionality and of the penalty imposed by a Member State in consideration of public safety and the sanction itself.[107] Thus,

104CJEU, C-326/88, Anklagemyndigheden v. Hansen & SPMI/S of 10 July 1990, ECLI:EU:C:1990:291, I-02911.

105CJEU, C-326/88, Anklagemyndigheden v. Hansen & SPMI/S of 10 July 1990, op. cit., "(…) referring to the judgment of the European Court in the Salabiaku case (…) the principle of proportionality applied by the European Court of Human Rights in relation to Art. 6 of the European Convention for the Protection of Human Rights therefore allows certain restrictions to the principle "*nulla poena sine culpa* (...)". Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 48.

106Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 49: "(…) generalist and general preventive moment of criminal law was reserved for the matter of the reconstruction of the fact, of what is forbidden to do, and of the impersonal rules that delimit it. Instead, the judgment on the personalization of responsibility, on the normality of the motivation and its conditions, was (wanted to be) alien to moments of general prevention, aiming to define guilt according to parameters of personalization and individualization of the judgment (…) guilt was delimited by parameters of law that were obvious and with the entry of general preventive concerns that define the avoidability of *ignorantia iuris*, of drunkenness, of the punishable age, of other excuses. However, the focus of guilt had to remain the barrier to general prevention, both in terms of delimiting proportion, and in terms of individualization (personalization) of the judgment (…)".

107CJEU, C-83/94, Leifer and others of 17 October 1995, ECLI:EU:C:1995:329,

the principle of guilt is reduced to an element that is based on the unlawful act and the punishability of those who take into consideration the adequacy of the principle of proportionality and forms of objectivity as a sort of balance between the interest that follows the sanction and the interest of protecting the citizen's freedom as protection of the principle of guilt that requires citizens to behave in a controllable manner. The CJEU stated in the Käserei Champignon case that:

"(...) control of the sanction is carried out with reference to the principle of proportionality and not to the principle *"nulla poena sine culpa"* (…)".[108]

In Ebony Maritime v. Prefect of Brindisi, a case involving a conflict between a national provision adopted pursuant to Article 10(2) of Regulation No. 990/1993,[109] which disregarded the principle of *poena sine culpa* and, within the limits of the confiscation requirement establishing a regime of objective liability. The violation of the principle of proportionality was overcomed and the CJEU stated:

"(...) a system of objective criminal liability, which penalises the violation of a Regulation, is not, in itself, incompatible with Community law (see Hansen judgment) (...)[110] it can be stated that in common legal traditions the principle

I-03231, par. 22. C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, ECLI:EU:C:2011:191, I-02359, par. 123. C-367/89, Richardt and "Les Accessoires Scientifiques" SNC of 4 October 1991, ECLI:EU:C:1991:376, I-04621.

108CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 49.

109Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro). OJ L 102, 28.4.1993, p. 14-16.

110CJEU, C-177/95, Ebony Maritime and Loten Navigation of 27 February 1997,

of culpability is not uniform, therefore it is not possible to deduce from the legal traditions of the Member States a general validity of the principle of culpability in the area of administrative sanctions (…)".[111]

The legitimacy of objective liability is provided for in the legal systems of the Member States, in the law of the Union, and in the field of *sui generis* sanctions (Böse, 1996).[112]

In these cases the CJEU evaluates the principle of proportionality as a sanction that appropriately and necessarily considers the objectives of the principle of culpability and the terms of compliance with the principle of proportionality of the sanction in question.[113]

Compliance with the principle of proportionality applies to circumstances in which the sanction is not due to an irregularity resulting from force majeure. Thus, the violation does not reach a certain severity.

ECLI:EU:C:1997:89, I-01111.

111CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 49.

112C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit., C-83/83, Estel v. Commisison of 17 May 1984, ECLI:EU:C:1984:185, I-02195. C-338/89, Danske Slagterier of 7 May 1991, ECLI:EU:C:1991:192, I-02315. C-20/84, De Jong/Vib of 3 July 1985, ECLI:EU:C:1985:286, I-02061: "(…) the fulfillment of the objective conditions of the case gives rise to a presumption of guilt, considered admissible because it is refutable; only this interpretation is considered compatible with the principle of guilt, required (…) by Art. 15 of Regulation no. 17/62 for the sanctions of the EEC Treaty and present in most of the Member States. Even in the sector of the confiscation of securities, part of the doctrine (which considers such sanctions to be punitive) believes that we are faced with presumptions of guilt, if not actual hypotheses of objective liability, where the return of the security is allowed only in the case of force majeure and the burden of proving this element falls on the recipient of the sanction (…)".

113CJEU, C-365/92, Schumacher/Bezirksregierung Hannover of 23 November 1993, ECLI:EU:C:1993:904, I-06071.

The cases and presumptions of guilt do not require the ascertainment of guilt, which presumes the agent who is aware of the illegitimacy of the request for systematic checks and the regularity of requests for the relevant contributions as reasoning of proof against the recipient of his own sanction.

The legal system of the Union recognizes presumptions of guilt. They are not limited within the limits of force majeure. These are therefore pure hypotheses of objective liability.[114]

The jurisprudence of the ECtHR and the CJEU has allowed us to understand that the principle of guilt is not a fundamental right of the Union and that it should not have been missing from the CFREU, but is a principle that is affirmed as a fundamental right of punitive law in a democratic state, a state of law.

Guilt principle and application of administrative punitive sanctions

Jurisprudential developments in many European countries often rely on the guilt principle (Dannecker, 1994). Therefore, the CJEU has required the determination of guilt within the scope of competition protection, expressly requiring intent, negligence, and the purpose of the punishment (Hamann, 1992).[115]

114CJEU, C-240/90, Germany v. Commission of 27 October 1992, ECLI:EU:C:1992:408, I-05383.

115CJEU, C-83/83, Estel v. Commisison of 17 May 1984, op. cit., C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit., parr. 108-113. conclusions of the Advocate General Christine Stix-Hackl in case C-196/99 P, Siderúrgica Aristrain Madrid SL of 26 September 2002, ECLI:EU:C:2002:537, I-

This is also reflected in the ruling on Article 23 of Regulation No. 1/2003 and the related concerns regarding compliance with the guilt principle and the principle of solidarity for associated enterprises.[116] The Advocate General Yves Bot noted in the ThyssenKrupp Nirosta GmbH case:

"(…) the applicability of the principle of personal liability to the competition rules in the aforementioned judgment in Commission v. Anic Partecipazioni[117] (…) the principle of personal liability and its corollary, namely the principle of the personal nature of penalties and sanctions, on which the imputability of unlawful agreements is based (…) constitute fundamental guarantees of criminal law (…) these principles therefore preclude the incurring of liability on the part of a natural or legal person who has not been the author or accomplice of an infringement and at the same time place limits on the exercise of the *jus puniendi* of public authorities (…)".[118]

In the Anic case, as a response to the violation of the principle of personal criminal liability and as an analogous application, the CJEU stated that:

"(…) the personal nature of liability would be respected in the sense that the undertaking would have participated with conduct specific to the

11005, par. 123ss. Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, ECLI:EU:C.2002:208, I-04219, par. 62ss. Conclusions of the Advocate General in case: C-56/02, Ihw Rebmann GmbH v. Hauptzollamt Weiden of 13 February 20023, ECLI:EU:C:2003:98, I-05499, par. 51. conclusions of the Advocate General Colomer in case: C-205/00 P, Irish Cement Limited v. Commission of 11 February 2003, ECLI:EU:C:2003:81, I-00123, par. 105.

116CJEU, C-194/14, AC-Treuhand AG of 22 October 2015, op. cit., par. 134-135.

117CJEU, C-49/92 P, Commission v. Anic Partecipazioni SpA of 8 July 1999, ECLI:EU:C:1999:356, I-04125, par. 78.

118CJEU, C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit., par. 163.

infringement and that the very notions of agreement and concerted practice imply the ascertainment of awareness of the unlawful conduct of the other participating undertakings or of the reasonable foreseeability of these and of the relative willingness to accept the risks (…) whether, as in the present case, it concerns agreements and concerted practices with an anti-competitive aim (…) proving that the undertaking intended to contribute with its own conduct to the common objectives pursued by all the participants and that it was aware of the material conduct envisaged or implemented by other undertakings in pursuing the same objectives, or that it could reasonably foresee them and was prepared to accept the risks (…)".

These are jurisprudential positions that interpret the recognition relating to the principle of guilt.

The Advocate General Colomer, in the Aalborg Portland A/S case, stated:

"(...) the guilt principle is a general principle of law, developed as a limit to the exercise of the *ius puniendi* to public authorities, and that on the basis of this principle a regime of objective or no-fault liability is not admissible even in relation to legal persons[119] (...) the requirement to prove guilt, as a prerequisite for the sanction, in accordance with the presumption of innocence[120] or states that the sanction must be proportionate to the guilt

119CJEU, see the conclusions of the Advocate General Colomer in joined case: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S v. Commission of 11 February 2003, ECLI:EU:C:2003:85, not published, par. 65.

120CJEU, conclusions of the Advocate General Colomer in joined case: C-217/00, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P), Buzzi Unicem SpA of 11 February 2003, ECLI:EU:C:2003:83, not published parr. 292-235ss, which recalls the principle of guilt in its conclusions, but as a prohibition of liability for the actions of others the Advocate General Juliane Kokott in case: C-280/06, ETI SpA and others of 3 July 2007, ECLI:EU:C:2007:404, I-10893, par. 71. Conclusions of the Advocate General Colomer in joined case: C-55/07 and C-56/07, Othmar Michaeler Subito of 24 January 2008, ECLI:EU:C:2008:42, I-03135, parr. 57-59: "(…) the sanction must correspond to the intention of the author of the

"sanctions imposed" (...) without allowing corrective criteria that modulate the sanction on the basis of the guilt of the perpetrator of the infringement, violate the Community principle of proportionality (...)".

The guilt principle is recognised as a criterion that measures the penalty within the scope of assessment and in compliance with the principle of proportionality. The subjective element clarifies that the notion of intentional non-compliance appears in regulations in the field of agricultural policy. In this case, the violation of rules is requested, the subject pursues the situation of non-compliance and accepts the possibility of non-compliance as a verification of persecution.[121]

The CJEU seeks to assess negligence as a form of fault that takes into account the relative complexity of regulatory provisions. Failure to perform arises from the obligation relating to the professional experience of an operator as well as the diligence of the operator and the related commercial risk. The elements, such as evaluation criteria based on the behavior of an

infringement. To satisfy this requirement, legal systems introduce corrective criteria in the form of mitigating or aggravating circumstances. Similarly, typical behaviors are distinguished between intentional and negligent actions. The sanction is thus modulated according to the intention of the author of the infringement, concretizing the responsibility of the latter. In jurisprudence, this operation appears as an aspect of the principle of proportionality (…)".

121CJEU, C-396/12, Van der Ham and Van der Ham-Reijersen Van Buuren of 27 February 2014, ECLI:EU:C.2014:698, published in the electronic Reports of the cases: "(…) we should have been talking about an autonomous and uniform notion of European Union law, developed taking into account the usual meaning of the terms, the context in which the articles are placed and the purposes of the legislation (…)". Conclusions of the Advocate General Bot in case: C-72/11, Afrasiabi and others of 16 November 2011, ECLI:EU:C:2011:737, I-14288. T-434/11, Europaisch-Iranische Handelsbank AG v. Council of 6 September 2013, ECLI:EU:T:2013:405, not yet published.

economic operator that manifests the relative negligence,[122] allowed the Advocate General Kokkot to affirm that:

"(...) awareness that damage may occur is not necessarily required for the purposes of gross negligence (…)".[123]

The principle of culpability within European law is confirmed according to the recognition of a category of inevitability of an error that prohibits and excludes culpability and sanction (Tiedemann, 1993).[124] The Advocate General Reishl, in his conclusions in the Hoffman-La Roche case, tried to highlight the general principle of Union law as a theory:

"(…) of the inevitable error on the precept[125] (…) all economic operators in whom an institution has given rise to well-founded hopes[126] can appeal to the

122CJEU, CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., parr. 75, 82. C-279/05, Vonk Dairy Products BV v. Productschap Zuivel of 11 January 2007, ECLI:EU:C:2007:18, I-00239, par. 33.

123CJEU, Advocate General J. Kokott in case: C-308/06, The International Association of Independent Tanker Owners and others of 20 November 2007.

124CJEU, C-308/97, Manfredi v. Regione Puglia of 25 November 1998, ECLI:EU:C:1998:566, I-07685.

125CJEU, conclusions of the Advocate General Reischl in case: C-107/76, Hoffman-La Roche AG v. Centrafarm Vertiebsgesellschaft Pharmazuetischer Erzeugnisse mbH of 5 May 1977, ECLI:EU:C:1977:73, I-00957. C-344/85, Ferriere San Carlo v. Commission of 12 November 1987, ECLI:EU:C.1987:486, I-04435. Conclusions of the Advocate General Van Themaatn in case: C-20/91, De Jong v. Staatssecretaris van Financiën of 27 February 1992, ECLI:EU:C:1992:103, I-028147.

126GC, T-304/06, Reber v. OHMI-Chocoladefabriken Lindt & Sprüngli (Mozart) of 9 July 2008, ECLI:EU:T:2008:268, II-01927, parr. 61 and 64. T-213/01 and T-214/01, Österreichische Postsparkasse und Bank für Arbeit und Wirtschaft v. Commission of 7 June 2006, ECLI:EU:T:2006:151, II-01601, par. 210. T-203/97, Forvass v. Commission of 6 June 1999, ECLI:EU:T:1999:135, II-00705, par. 70. T-319/00, Borremans and others v. Commission of 26 September 2002, ECLI:EU:T:2002:229, II-00905, par. 63. conclusions of the Advocate General Yves Bot in case: C-455/06, Heemskerk BV Firma Schaap v. Productschap Vee en Vlees of 6 May 2008, ECLI:EU:C:2008:258, I-08763, par. 137, which is affirmed that: "(…) The court also specified that, in applying national law, principles such as that of legal certainty and the protection of legitimate expectations may be taken into consideration

principle of the protection of legitimate expectations (…) legitimate expectations can be invoked by anyone who has committed a manifest violation of the legislation in force (…)" (Jeschek, 1953).[127]

In this case, the CJEU tries to highlight the attribution of an error on the prohibition to a specific case that the erroneous belief of the economic operator does not hold a dominant position but the relative negligence of an appellant:

"(…) inadequate account of the structure of the markets on which it operated, or by the refusal to take those structures into consideration (…) culpability, specifying (…) the appellant intentionally pursued a commercial policy aimed at preventing access to the markets by new contractors (…)".[128]

The principle of guilt highlights in the context of Regulation No. 2988/1995 that the application of economic sanctions from the Union are of an administrative punitive nature, intentional, negligent behaviors not reprehensible with compensatory measures which are not considered as sanctions intended for a *restitutio in integrum* (Tiedemann, 1990).[129]

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by the national judge together with the principle of legality, provided that full account is taken of the Community interest (…)".

127CJEU, T-41/99, T-142/99, T-150/99 to T-151/99, Vela Srl-Tecnagrind SL of 7 November 2001, op. cit., par. 111.

128-107/76, Hoffman-La Roche AG v. Centrafarm Vertiebsgesellschaft Pharmazuetischer Erzeugnisse mbH of 24 May 1977, op. cit.

129CJEU, C-447/20 and C-448/20, IFAP 7 April 2022, ECLI:EU:C:2022:65, published in the electronic Reports of the cases, par. 74. C-116/12, Christosoulou and others of ECLI:EU:C:2013:825, published in the electronic Reports of the cases, par. 67. C-150/10, Beneo-Orafti of 21 July 2011, ECLI:EU:C:2011:507, I-06843, par. 70ss. Conclusions of the Advocate General Sharpston in case: C-607/13, Cimmino and others of 5 February 2015, ECLI:EU:C:2015:67, published in the electronic Reports of the cases, par. 112: "(...) obligation to return a benefit, in such circumstances, does not constitute a sanction. It simply follows from the fact that the benefit obtained was an undue advantage because the conditions necessary for obtaining the benefit under Union rules were created artificially (…)".

The principle of guilt as a value established by a provision examining Regulation no. 2988/1995 calls for the application of European sanctions within art. 5, no. 2 which requires the relative guilt as a possible sectoral sanctioning provision where the application of punitive sanctions is irregular and does not cause sectoral sanctioning provisions:

"(…) at least Article 5 of Regulation No. 2988/1995 recognises the principle of guilt as a general principle[130] (...) its result and not to the existence of intent or gross negligence (...) the lack of such an element does not justify the failure to impose the sanction provided for by Community legislation for a duly ascertained irregularity[131] (...) to ensure the correct application of the export refund regime, sanctions must be applied regardless of the subjective element of negligence, in order to induce exporters to comply with Community legislation (...) as stated in the Hansen judgment according to which strict liability can pursue a general preventive effect (…)".[132]

The guilt principle considers the burden of proof as a defence, which allows the entrepreneur to avoid the sanction and demonstrate the lack of guilt.[133] In the Strawson case, the CJEU

130CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., parr. 50, 57.

131CJEU, C-374/99, Spain v. Commission of 13 September 2001, ECLI:EU:C:2001:443, I-05943, par. 32 and 34: "(…) Therefore, the refusal of national authorities to apply Community sanctions in the absence of intent and gross negligence is considered justified and in conflict with the principle of proportionality indicated in art. 2, no. 3 which requires that the sanction be set "according to the nature and gravity of the irregularity" (…)".

132See the conclusions of the Advocate General A. Tizzano in case: C-1/02, Privat-Molkerei Borgmann GmbH & Co. KG v. Hauptzollamt Dortmund of 3 July 2003, ECLI:EU:C:2003:393, I-03219, par. 60.

133CJEU, C-304/00, Strawson and Gag & Sons of 19 November 2002, ECLI:EU:C:2002:695, I-10737, par. 62. conclusions of the Advocate General Léger in case: C-45/05, Maatschap Schonewille-Prins of 13 July 2006, ECLI:EU:C:2006:466, I-03997.

stated that the sanction provided for by Art. 9, no. 2 of Regulation no. 3887/1992[134] did not apply to the entrepreneur's incorrect information, which was recognized by the competent authority.[135]

In the Maatschap case, the guilt principle and the provisions of Regulation no. 2419/2001, which provides for reductions and exclusions for those who have committed irregularities in aid applications, establish measures that:

"(…) the entrepreneur has provided effectively correct information or when he can otherwise demonstrate that he is free from fault (...)[136] the applicability of punitive administrative sanctions (dissuasive and effective) even in the absence of intent or gross negligence, considering this neither unjustified nor disproportionate,[137] provided that the sanction has a clear and unequivocal legal basis (principle of legality) and complies with the principle of proportionality (…)".[138]

The CJEU continues to examine, manage and control sanctions against behaviors that, in the absence of fault and in the presence of causes of force majeure, are compatible with the principle of culpability and in accordance with the principle of

134Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes. OJ L 391, 31/12/1992, p. 36-4.

135CJEU, C-304/00, Strawson and Gag & Sons of 19 November 2002, op. cit., par. 62.

136CJEU, C-304/00, Strawson and Gag & Sons of 19 November 2002, op. cit.

137CJEU, C-307/03, Italy v. Commission of 10 November 2005, ECLI:EU:C:2005:667, not yet published, par. 50. C-354/95, The Queen v. Minister for Agriculture, Fisheries and Food, *ex parte*: national Farmers'Union and others of 17 June 1997, ECLI:EU:C:1997:379, I-04559.

138CJEU, CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 52.

proportionality.[139]

The principle of legal certainty and respect, and proportionality for the defense, aims to highlight injustice in the area of equal treatment, whether committed intentionally or negligently against individuals who acted in good faith. Thus, criticisms of the principles of proportionality, legal certainty, and equal treatment do not prohibit sanctions that distinguish between the severity of the penalty for intent and for irregularity.[140]

The interpretation of force majeure after the entry into force of Regulation No. 2988/1995 highlights not only an objective nature that corresponds to the interpretation of force majeure, but also the cause for exclusion of suitability and the typical nature of fault that ends and admits forms of liability for the actions of others. Thus, force majeure is denied, which requires the legitimate expectation of the party requesting restitution and the export of good faith based on false information for the contractual partners. That is, information:

"(...) external to the operator concerned, anomalous and unforeseeable, the consequences of which could not have been avoided despite the use of maximum diligence (…)".[141]

139See the conclusions of the Advocate General A. Tizzano in case: C-1/02, Privat-Molkerei Borgmann GmbH & Co. KG v. Hauptzollamt Dortmund of 3 July 2003, op. cit., par. 60.

140CJEU, CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 67. C-354/95, The Queen v. Minister for Agriculture, Fisheries and Food, *ex parte*: national Farmers'Union and others of 17 June 1997, op. cit., par. 35.

141CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., parr. 95, 101-102. C-366/95,

This interpretation conflicts with the principle of reliance, where the objective duty of diligence is within possible limits that are compatible with the personal nature of criminal liability ending up as a sort of *culpa in re ipsa* given that it acts with other partners and is responsible for violations that cause a malicious conduct for the partners.

This type of liability foresees and prevents fraudulent behavior by those who choose the wrong partner. In this spirit, the conclusions of Advocate General Mazàk in the Netto Supermarket case affirmed that disproportionate liability holds a taxpayer liable for fraudulent behavior by third parties. He stated, in this regard:

"(...) despite certain differences relating to the factual circumstances, it is clear that a taxpayer acting in good faith, and more specifically, one who did not participate in the irregularities and took all reasonably necessary precautions, cannot be liable for the fraudulent behavior of others (…)".[142]

The CJEU did not accept Advocate General Kokott's arguments in the Schenker case,[143] where she denied the possibility of use and error of duty.

Landbrugsministeriet v. Steff-Houlberg Export and others of 12 May 1998, ECLI:EU:C:1998:216, I-02661, par. 22. C-298/96, Oelmühle and Schmidt Söhne Bundesanstalt für Landwirtschaft und Ernährung of 17 July 1998, ECLI:EU:C:1998:372, I-04767, par. 30.

142CJEU, conclusions of the Advocate General Mazàk in case: C-271/06, Netto Supermarkt of 25 October 2007, ECLI:EU:C:2007:638, I-00771, parr. 45 and 46.

143CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker and Co AG and others of 28 February 2013, ECLI:EU:C:2013:404, published in the electronic Reports of the cases.

The principle of effective and uniform application of EU law in competition matters places the CJEU before the obligation of national authorities to ignore defences and impose the relevant fines for infringements of a regulation under review, except in exceptional circumstances, which it states:

"(…) silence on fundamental legal principles such as the presumption of innocence and *nulla poena sine culpa* (no punishment without fault) (…) misplaced reliance on the principle of legitimate expectations in this context (…)" (Völcker, 2014).

It seems that the CJEU was interested in the supremacy of the principle of effective and uniform application of EU law in the competition sector, thus recognizing the fundamental legal principle of *nulla poena sine culpa*.

The affirmation of the guilt principle in the CJEU case law

The sanctions proposed by the CJEU for the assessment, promotion, and enforcement of the guilt principle, as well as the subjective attribution of this type of sanction pursuant to Article 5 of Regulation No. 2988/1995 and Article 4, regulate the following:

"(...) Article 5 of the aforementioned Regulation establishes that the sanctions[144] (...) provided for intentional or negligent irregularities, which, as

144 C-192/06, Kruck of 4 October 2007, ECLI:EU:C:2007:579, I-08149, par. 35. C-369/98, Fisher of 14 September 2000, ECLI:EU:C:2000:443, I-06751, parr. 43-47. conclusions of the Advocate General Manuel Campos Sánchez-Bordona in case: C-378/18, Westphal of 15 May 2019, ECLI:EU:C:2019:215, published in the electronic Reports of the cases.

a rule, constitute particularly serious irregularities, while the administrative measures referred to in Article 4 of the same Regulation (...) are also applicable to less serious cases of irregularity (…)".[145]

This highlights the relative influence of CJEU rulings in the areas of legality, foreseeability, as well as the recognition of the guilt principle and the ambiguity of the fundamental principle of criminal law, understood as the prohibition of relative liability for the actions of others and liability for one's own actions.

The CJEU has highlighted that human rights and the sentencing term under the ECtHR present the declaration of guilt where the ascertainment and the modalities that are provided by law for the commission of the crime impose a penalty.[146] The Advocate General Yves Bote states, in this regard:

"(...) "conviction" means any final decision of a criminal jurisdiction establishing the guilt of a person for a crime clarifying that conviction in European Union law presupposes the ascertainment of guilt and with a final pronouncement (…)".[147]

145CJEU, C-447/20 and C-448/20, IFAP 7 April 2022, op. cit., C-743/18, Elme Messer Metalurgs of 1st October 2020, ECLI:EU:C:2020:767, published in the electronic Reports of the cases, par. 60: "(…) Articles 4 and 5 of Regulation No 2988/95 draw a distinction between, on the one hand, the general concept of 'irregularity' and, on the other, that of 'intentional or negligent irregularity', that is to say a qualified irregularity, which may lead to administrative sanctions (...)". C-349/17, Eesti Paggar of 5 March 2019, ECLI:EU:C.2019:172, published in the electronic Reports of the cases.

146CJEU, C-270/17 PPU, Tupikas of 10 August 2017, ECLI:EU:C:2017:628, all cited cases published in the electronic Reports of the cases. ECtHR, Del Río Prada v. Spain of 21 October 2013.

147CJEU, C-171/16, Beshkov of 21 September 2017, ECLI:EU:C:2017:710, published in the electronic Reports of the cases, par. 29: "(…) brings within the scope of Framework Decision 2008/675 not only proceedings relating to the determination and ascertainment of the possible guilt of the person against whom criminal proceedings are being brought, but also those relating to the enforcement of the

The CJEU presupposed the pronouncement of guilt and the implicit recognition that conviction and punishment presuppose a finding of guilt that respects the guarantees of the criminal process. According to the conclusions of the Advocate General Bot in the Dawid Piotrowski case:

"(…) the principle of mutual recognition obliges the executing Member State to accept the issuing Member State's analysis as regards guilt, whether possible in the case of criminal prosecution or established in the case of a conviction pronounced in the issuing Member State[148] (…) previous judicial proceedings which have ruled on the guilt of the requested person allow the executing judicial authority to presume that the decision to issue the European arrest warrant for the purposes of executing a sentence was the result of national proceedings in which the sentenced person benefited from all the guarantees inherent in the adoption of this type of decision (…) fundamental rights and fundamental legal principles mentioned in Article 1, paragraph 3, of Framework Decision 2002/584 (…)".[149]

The CJEU[150] has highlighted the hypothesis of illicit exportation of cultural goods:

"(…) the means used to commit a crime cannot be subjected to confiscation, if the owner who claims it is in good faith and demonstrates that he was not

sentence for which the sentence imposed by a conviction previously rendered in another Member State must be taken into account (...)".

148CJEU, conclusions of the Advocate General Yves Bot in case: C-9/90, Francovich and Bonifaci of 19 November 1991, ECLI:EU:C:1991:428, I-05357.

149CJEU, C-627/19, ZB (Procuratore del Re di Bruxelles, Belgio of 12 December 2019, ECLI:EU:C:2019:1079, published in the electronic Reports of the cases. Conclusions of the Advocate General J. Kokott in case: C-488/19, Minister for Justice and Equality v. JR of 17 September 2020, ECLI:EU:C.2020:738, published in the electronic Reports of the cases, par. 51.

150CJEU, C-393/19, Okrazhna prokuratura-Haskovo and Apelativna prokuratura-Plovdiv of 14 January 2021, ECLI:EU:C:2021:8, published in the electronic Reports of the cases, par. 58.

aware of the illicit use made of it by the perpetrator of the crime[151] (...) represents a correct recognition of the principle of guilt, requiring the subjective element of awareness of the illicit use to allow this form of confiscation which, alongside a prohibitive purpose, takes on a certain punitive character (since it involves the removal of a legitimately owned good (...)".

The Advocate General Pitruzzella in the Sumal, S.L. v. Mercedes Benz Trucks España, S.L.[152] case states that:

"(…) in the public enforcement of competition law, given the quasi-criminal nature of the sanctions imposed, some fundamental principles come into play, first of all, the principle of personal responsibility, and its corollary according to which the imposition of a sanction and the identification of a responsibility presuppose fault (*nulla poena sine culpa*) (...)[153] legal definition of the joint responsibility of the parent company and the subsidiary for the anti-competitive conduct of the latter must therefore take into account the need to respect this principle (…) such unity of conduct on the market for the purposes of attributing to the parent company the anti-competitive conduct of the subsidiaries, the only element that is relevant is the exercise by the former of a decisive influence on the commercial policy of the latter (…) whether it is a question of attributing to the subsidiaries the anti-competitive conduct of the parent company (or rather of attributing such conduct to the economic unit of which they are part and of declaring their joint responsibility for such

151CJEU, C-393/19, Okrazhna prokuratura-Haskovo e Apelativna prokuratura-Plovdiv of 14 January 2021, op. cit., par. 59.

152CJEU, conclusions of the Advocate General G. Pitruzzella in case: C-882/19, Sumal, S.L. v. Mercedes Benz Trucks España, S.L. of 15 April 2021, ECLI:EU:C:2021:293, published in the electronic Reports of the cases, par. 3.

153CJEU, see the conclusions of the Advocate General Paolo Mengozzi in joined cases: C-231/11 P to C-233/11 P, Commission v. Siemens Österreich and others and Siemens Transmission & Distribution and others v. Commission of 19 September 2013, ECLI:EU:C:2013:578, published in the electronic Reports of the cases, parr. 74, 82.

conduct) it is, moreover, necessary that such subsidiaries have taken part in the economic activity of the undertaking managed by the parent company which materially committed the infringement (…) in the case of ascending liability, in which the subsidiaries adopt anti-competitive behaviour within the general framework of the parent company's power of influence, this power is sufficient both to identify an economic unit and to establish the joint liability of the parent company. In the reverse case, of descending liability, in which it is the parent company that commits the infringement, the unity of the economic activity will result - in addition to the decisive influence exercised by the former - from the fact that the activity of the subsidiary is, in some way, necessary for the implementation of the anti-competitive conduct (for example because the subsidiary sells the goods which are the subject of the cartel) (...) the functional concept of an undertaking as an economic unit concerns the concrete attitude of several legal entities on the market, its exact boundaries must be delineated precisely with reference to the economic activities that these entities carry out and to the role they play within the corporate group: on the one hand, the decisive influence exercised by the parent company, on the other, the activity of the subsidiary or subsidiaries objectively necessary for the implementation of the anti-competitive practice (...) (...) Article 101, paragraph 1, TFEU must be interpreted in the sense that it precludes a national legislation which provides for the possibility of attributing the responsibility for the conduct of a company to another company only if the second company controls the first company (…)".[154]

The conclusions of the dvocate Generale P. Mengozzi are taken into consideration and repeated in the Siemens Österreich and others and Siemens Transmission & Distribution cases where it

154CJEU, conclusions of the Advocate General G. Pitruzzella in case: C-882/19, Sumal, S.L. v. Mercedes Benz Trucks España, S.L. of 15 April 2021, op. cit., par. 69-70. C-503/22, M.S. and others of 5 September 2024, ECLI:EU:C:2024:685, published in the electronic Reports of the cases.

was stated that:

"(…) the principle of the personal nature of penalties and sanctions (…) is a corollary of the principle of personal responsibility and constitutes, together with this, a fundamental guarantee of criminal law which limits the exercise of the *ius puniendi* of public powers (…)".[155]

These are principles which are based on the field of competition law and refer to legal persons due to their non-punitive nature given that the sanctions are imposed by the commission to punish anti-competitive behavior.[156] The Advocate General Mengozzi underlines the prohibition of liability for the actions of others:

"(…) the principle of personal responsibility, in turn a corollary of the principle of guilt,[157] each person is responsible only for his own actions[158]

155CJEU, see the conclusions of the Advocate General Paolo Mengozzi in joined cases: C-231/11 P to C-233/11 P, Commission v. Siemens Österreich and others and Siemens Transmission & Distribution and others v. Commission of 19 September 2013, op. cit., par. 63. see the conclusions of the Advocate General Colomer in joined case: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. Aalborg Portland A/S v. Commission of 11 February 2003, op. cit., par. 64. conclusions of the Advocate General Bot in joined cases. C-201/09 P to 216/09, ArcelorMittal Luxembourg v. Commission and Commission v. ArcelorMittal Luxembourg and others of 26 October 2010, ECLI:EU:C:2010:634, I-02239, par. 181. C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit.

156CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit., par. 40, which is used the case from the ECtHR Menarini Diagnostics v. Italy of 27 September 2011, parr. 38-45: "(…) the criminal nature within the meaning of Article 6, paragraph 1, of the ECHR of a fine imposed under Italian competition law by the Competition and Market Authority (…)".

157CJEU, see the conclusions of the Advocate General Colomer in joined case: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P e C-219/00 P. Aalborg Portland A/S v. Commission of 11 February 2003, op. cit., par. 71: "(…) principle of the personal nature of penalties and sanctions (…) the principle of guilt comes into consideration, specifically in Article 23, paragraph 2, of Regulation No. 1/2003, which presupposes intentionality or negligence for the imposition of fines for infringement of the competition rules (…)".

158 C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op.

(…) the principle of the personal nature of penalties and sanctions, more specifically, a person can be sanctioned exclusively for actions attributed to him individually[159] (…) according to this principle, therefore, only the author of the violation can suffer a sanction for such violation[160] (…) such sanction cannot be suffered by a person other than the guilty party (…)".[161]

The principle of personal liability has been interpreted as a pure prohibition of liability for the actions of others and as a principle of culpability, i.e., liability for the guilty party's own actions. The relevant reference to competition law states that:

"(...) the principle of personal liability applies primarily to the undertaking, which, being subject to the Union's competition rules, must, as a single economic entity, albeit not necessarily with its own legal personality, be personally liable if it commits an infringement of those rules, intentionally or negligently (…)".[162]

This is confirmed in the text of Art. 23, par. 2 of Regulation no. 1/2003, which provides for a fine to be imposed on the undertaking intentionally and/or negligently whoever commits an infringement of the competition rules. The CJEU recognized the relevant obligation that was committed by several companies to determine the relative gravity of the participation of each

cit., par. 63.

159C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit.

160CJEU, see the conclusions of the Advocate General Colomer in joined case: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. Aalborg Portland A/S v. Commission of 11 February 2003, op. cit.

161CJEU, C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, cit., par. 64.

162CJEU, C-501/11 P, Schindler Holding and others v. Commission of 18 July 2013, ECLI:EU:C.2013:522, published in the electronic Reports of the cases, par. 101 and 129.

company[163] and to regulate the sanction according to:

"(…) behaviors and characteristics of the companies involved (...)[164] as a reminder of the principle of guilt and the commensuration of the penalty".[165]

The Advocate General Priit Pikamäe in the ThyssenKrupp case[166] took into account the conclusions of the Advocate General Bot in the ThyssenKrupp case,[167] who underlined:

"(…) the applicability of the principle of personal responsibility and its corollary, namely the principle of the personal nature of penalties and sanctions[168] (…) recalled the prohibition on punishing a person for an offence committed by a third party and this in the light of Article 6, para. 2, and Article 7 ECtHR which both protect the right recognised to every person not to have a penalty imposed without his personal responsibility having been duly established (…)".[169]

The principle of guilt is expressed and recognised in a criminal trial as:

"(…) a trial which may end with a decision of guilt or innocence (…) admitting that such a trial may take place in the absence of the accused within

163CJEU, CJEU, C-49/92 P, Commission v. Anic Partecipazioni SpA of 8 July 1999, op. cit., par. 150. C-51/92, Hercules v. Commission of 8 July 1999, ECLI:EU:C:1999:357, I-04235, 110.

164CJEU, conclusions of the Advocate General Yves Bot in case: C-76/06 P, Britannia Alloys & Chemicals Ltd of 1st March 2007, op. cit., par. 44.

165CJEU, see the conclusions of the Advocate General Paolo Mengozzi in joined cases: C-231/11 P to C-233/11 P, Commission v. Siemens Österreich and others and Siemens Transmission & Distribution and others v. Commission of 19 September 2013, op. cit., par. 37.

166CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 34.

167C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit., par. 51.

168CJEU, C-49/92 P, Commission v. Anic Partecipazioni SpA of 8 July 1999, op. cit., par. 78. C-97/08 P, Akzo Nobel and others v. Commission of 10 September 2009, ECLI:EU:C:2009:536, I-08237, parr. 56 and 77.

169CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 42.

the limits set by Articles 8 and 9 of Directive (EU) 2016/343[170] of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (…)".[171]

Legal persons and guilt

According to the CJEU the principle of guilt in the application of EU law has been based on legal persons. The competition law and the report on Regulation No. 2988/1995 emphasized that EU law and the CJEU have emphasized the recognition of the principle of guilt in the application of punitive sanctions against their entities.

In this spirit, the Advocate General Priit Pikamäe in the Delta Stroy case 2003[172] noted that:

"(…) the principle of recognition of fundamental rights to legal persons is now established[173] in line with a case law which (…) has found fertile ground

170CJEU, C-653/19 PPU, DK-Spetsializirana prokuratura of 28 November 2019, ECLI:EU:C:2019:1024, published in the electronic reports of the cases. C-467/18, Rayonna prokuratura Lom of 19 September 2019, ECLI:EU:C.2019:765, published in the electronic reports of the cases. C-377/18, AH and others (presumption of innocence) of 5 September 2019, ECLI:EU:C:2019:670, published in the electronic reports of the cases. C-310/18 PPU, Milev of 19 September 2018, ECLI:EU:C:2018:732, published in the electronic reports of the cases. Joined cases C-202/18 and C-238/18, Ilmārs Rimšēvičs v. Latvia of 10 April 2019, ECLI:EU:C:2019:299, published in the electronic reports of the cases. C-216/18 PPU, Minister for justice and Equality (Deficiencies in the system of justice) of 25 July 2018, ECLI:EU:C:2018:586, published in the electronic reports of the cases.

171CJEU, C-569/20, Spetsializirana prokuratura (Procès d'un accusé en fuite) of 19 May 2022, ECLI:EU:C:2022:401, published in the electronic reports of the cases.

172CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 44

173CJEU, C-481/19, Consob of 2 February 2021, ECLI:EU:C:2021:84, published in the electronic reports of the cases. C-419/14, WebMindLicenses of 17 December 2015, ECLI:EU:C:2015:832, published in the electronic reports of the

for expression in the economic sector and, more specifically, in the competition sector, given that the effects of the relevant legislation primarily concern commercial companies (…) litigation concerning the repression of infringements of competition law, which does not fall strictly within criminal matters (…) applied certain essential principles of criminal law and certain fundamental guarantees enshrined in Article 6 ECHR[174] to the benefit of the applicant legal persons (…) principle of personal responsibility and its corollary, namely the principle of the personal nature of penalties and sanctions, on which the imputability of unlawful agreements is based (…)".[175]

The guilt of legal persons presupposed the application of punitive sanctions. And that's why it was stated that Article 7 of Regulation No. 2988/1995 provided for the direct application of punitive administrative sanctions also to legal entities. According to Article 5, the application of punitive administrative sanctions presupposed the culpability of the recipient and the application of the sanctions to legal entities. Also the sanctions provided for in Article 5 are based on the culpability of a legal entity.

cases, par. 79.

174CJEU, C-46/87 and 227/88, Hoechst v. Commission of 21 September 1989, ECLI:EU:C:1989:337, I-02859, par. 13: "(…) fundamental rights form an integral part of the general principles of law whose observance the court ensures and that, to this end, the latter draws inspiration from the constitutional traditions common to the Member States and from the indications provided by international treaties on the protection of human rights to which the Member States have cooperated or to which they have acceded, it being understood that the ECHR assumes a particular significance in this respect (…)".

175CJEU, C-49/92 P, Commission v. Anic Partecipazioni SpA of 8 July 1999, op. cit., par. 78. C-97/08 P, Akzo Nobel and others v. Commission of 10 September 2009, op. cit., parr. 56, 77.

It was the same commission that highlighted the form of an autonomous responsibility for a structure, whereas the responsibility of a culpable organization prevented the commission of illicit acts (Otto, 1993).

In this direction, the jurisprudence of the Union, in the field of sanctions, refers to a notion of guilt for behaviors that have an objective nature, in relation to the illegitimate offenses committed by collaborators.[176]

The Advocate General Colomer, in the Volkswagen AG case, established that the infringement effectively identified each individual as being charged with illicit behavior. The guilt of a legal person is not equated with that of a natural person, recognizing the total impunity that annuls any accusation, sufficient for executive orders issued by individuals lacking legal knowledge.[177]

The requirement to hold a company accountable for the objective and subjective elements of an infringement specified by the Commission itself conflicts with elements relating to the nature of competition law and the right to businesses that divide the work of their organizations.

176CJEU, Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, op. cit., par. 67.

177CJEU, Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, op. cit., par. 66-67: "(…) who therefore believes that legal persons cannot be granted the same procedural guarantees as those granted to the most vulnerable individual (the requirements of circumstantial evidence must be interpreted less rigorously, as this is often the only method that allows the intentionality of the infringement to be ascertained) (...)"

The acts of persons authorized to act on behalf of businesses must be attributed to the latter.[178] Regulation No. 2988/1955 does not specify that the draft Regulation, groups of associations, and natural and legal persons are liable for irregularities committed by a natural person acting on their own behalf and exercising legal and factual decision-making powers. Thus, the lack of this specification highlights the independent nature of liability for a legal person in this matter.

European ordinances (Ordnungswidrigkeiten) apply in German law. The CJEU, in this regard, has held companies and associations liable for their conduct as well as liability of natural persons acting as external agents for the breach of obligations by managers of a legal entity that facilitated the unlawful acts committed.[179]

The organicist theory for the imputation of a legal entity states that the actions of natural persons are governed by European case law, from which no criteria for imputation emerge. It is noted that the importance of the perpetrator, the guilty party, and the violation of organizational, diligence, prevention, and control obligations are related to the company.

The association that formed its bodies, and its representatives,

178CJEU, Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, op. cit., par. 67.

179CJEU, 7 June 1983, Musique Diffusion française, C-100-103/80, in Racc., 1903.

constitute a core that challenges the normative basis[180] and simultaneously places the notion of guilt on a foundation that the legal person, within a teleologically oriented conception of punitive law, is responsible for the height of the demands of a legal system that activates internal management and control mechanisms to prevent the Commission of unlawful acts. In this way, the lack of control over a company that legal persons allow to create a specific situation is established.

The Commission applies the relevant standards of culpability, which are rigorous towards legal entities. The natural persons managing the company knew that the unlawful act was not being committed directly.[181] The Commission and the CJEU, with a rigorous and precise approach in the area of error, refer to normative elements.

The concept of abuse of a dominant position is negligent in nature[182] when the relevant knowledge is lacking.[183] This is an approach that, with respect to large international companies, is

180 83/667/EEC: Commission Decision of 5 December 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.671 - IPTC Belgium) (Only the French text is authentic) OJ L 376, 31.12.1983, p. 7–10 (DA, DE, EL, EN, FR, IT, NL): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31983D0667 Accessed on 18.09.2025.

181 CJEU, C-226/84, Britisch Leyland of 2 August 1984, ECLI:EU:C:1984:421, I-03263. C-279/87, Tipp-Ex of 10 August 1987, ECLI:EU:C:1987:230, I-00261.

182 CJEU, C-352/13, CDC Hydrogen Peroxide v. Akzo Novel and others of 21 May 2015, ECLI:EU:C:2015:335, published in the electronic Reports of the cases.

183 CJEU, C-19/77, Miller International Schallplatten GmbH of 1st February 1978, ECLI:EU:C:1978:19, I-00131, par. 151. CJEU, C-96/102, 104, 105, 108, 110/82, NV Jaz International Belgium and others of 8 November 1983, ECLI:EU:C:1983:178, I-07819.

related to small companies, thus requiring knowledge of the decisions of the CJEU and the Commission.[184]

It was the Advocate General Schenker who referred to Article 6, paragraph 2 ECHR regarding the constitutional traditions of the Member States as well as Article 23, paragraph 2 of Regulation No. 1/2003 which provided that the Commission imposed fines for negligent and intentional infringements. The Advocate General held that errors of law were eligible for antitrust liability and unavoidable errors can do so, thus:

"(…) the undertaking must have taken all possible and reasonable steps to avoid its alleged infringement of EU antitrust law (…) appears to occur only very rarely". From this perspective, it is believed that reliance on legal advice can lead to an "unavoidable" error of law and the Court's dictation in the Miller judgment of 1978 – according to which legal advice could not justify a violation of Article 85 EEC – is no longer justified after the entry into force of Regulation No. 1/2003 (…)" (Frenz, 2014).[185]

The rigorous approach towards legal persons respects the principle of guilt as well as the presumption of innocence. This approach is evident in the conclusions of the Advocate General Priit Pikamäe in the Delta Stroy case which:

"(...) recognises the compatibility of the regime of criminal liability of legal persons accepted in the Bulgarian legislation (in the field of tax crimes) (...) liability for one's own actions by reason of a relationship of representation

184CJEU, C-19/77, Miller International Schallplatten GmbH of 1st February 1978, op. cit., par. 160.

185CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit., parr. 40, 41.

and not of a substitution[186] (...) on a presumption regarding the commission of the crime by the entity, where criminal proceedings are initiated against the natural person, considering such presumption to be provided for by law and proportionate to the aim pursued, as well as respectful of the right of defence[187] (...) it thus seems that the legal person can be criminally sanctioned for a crime committed by the natural person with the power to contract obligations in its name without the competent judge being able, at first instance or on appeal, to assess the actual commission of the said crime, this question being reserved to the decision concerning the said second person (...) suspend the proceedings pending such judgment (…) respect for the presumption of innocence and the right of defence the possibility (art. 83f of the ZANN) to reopen the proceedings (extraordinary remedy), in particular upon request of the sanctioned legal person (…) the public prosecutor shall dismiss the proceedings against the said natural person because the act has not been committed or is devoid of criminal relevance, or in the event of acquittal of the same by a final decision (…) rebut the presumption of commission of the crime (…) the legal person concerned may be the subject

186JEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit., par. 47: "(…) liability of the legal person approaches an indirect or reflex liability, noting that said legal person can act only through natural persons having the power to contract obligations in its name. Such a qualification, capable of violating Article 7 of the ECHR and Article 49 of the Charter, which establish the principle of the personal nature of penalties, is however not correct in the hypothesis of a liability based on the technique of representation. In fact, the natural person concerned is not third party with respect to the legal person but is the legal person, with which he identifies himself. The latter will be criminally liable as the author of the crime committed on his behalf by a natural person having the power to contract obligations in his name and who has satisfied the constituent elements of the crime (…) liability for one's own actions by reason of a relationship of representation and not of a substitution (…)".

187CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit, par. 50: "(...) the prosecutor may submit to the criminal judge a request indicating the personal data of the persons "accused" of the crime and that said judge may impose a pecuniary sanction on a legal person regardless of the actual occurrence of liability on the part of the (natural) persons involved in the crime (…)".

of a final conviction decision, followed by its enforcement (…) of the adoption of such objectively prejudicial decision, to assert its observations on the commission of the tax crime with which it is accused; this circumstance may undermine respect for the rights of defence (…) the sanctioned legal person may not oppose the forced execution of a decision which entails serious consequences for its financial health, including the risk of bankruptcy (…)".[188]

According to the author's opinion, this is a special regime under which the essential content of the fundamental right to effective judicial protection is intertwined with its constituent elements, that is, respect for the rights of defense and the right to a fair trial. Thus, violations of the rights of defense, the presumption of innocence, and the principles of due process arise from respect for these rights.

Recourse to an appeal is extraordinary and allows for the enforcement of these rights, which afford the convicted entity, the opportunity to defend itself against the charge and the right to be heard before a court. Thus, the nature of the entities allows for the weakening of the relevant guarantees and the denial of

188CJEU, C-189/18, Glencore Agriculture Hungary of 16 October 2019, ECLI:EU:C:2019:861, published in the electronic Reports of the cases, parr. 41 and 52. C-430/19, C.F. of 4 June 2020, ECLI:EU:C:2020:429, published in the electronic Reports of the cases, par. 30. C-60/12, Baláž of 14 November 2013, ECLI:EU:C:2013:733, published in the electronic Reports of the cases, par. 46: "(…) administrative tax audit procedures in the field of VAT must be applied *a fortiori* in the context of proceedings which may lead, in the same context, to the adoption of pecuniary sanctions of a criminal nature. § 53 For the entire duration of the pending criminal proceedings, as in the case of the company representative, the latter is in fact deprived of the possibility of filing a request for reopening before a judge competent to ascertain the failure to commit the crime with which it is accused and, therefore, the groundlessness of the criminal sanction imposed (…)".

fundamental rights and the principles of a fair criminal trial to be part of the appeal process.

He was the Advocate General himself who stated that:

"(...) the liability regime of the legal person provided for in Articles 83a et seq. of the ZANN seems to me to respond to an objective of general interest (...) it is possible to consider that such a regime falls within the implementation of the obligation, incumbent on each Member State, to take all legislative and administrative measures to ensure that VAT is collected in full within its territory and to combat fraud. Article 325, paragraph 1, TFEU obliges Member States to combat fraud (...) Member States must also ensure that the rules of criminal procedure laid down by national law allow for the effective suppression of offences linked to such unlawful conduct (...) ensure that the procedural regime applicable to the prosecution of offences affecting the financial interests of the Union is not designed in such a way as to entail, for reasons inherent to it, a systemic risk of impunity for the acts constituting such offences (...) sacrificing such protection at the altar of efficiency for fear of the "systemic risk of impunity", a risk which otherwise could always justify unacceptable presumptive evidentiary mechanisms (…)".[189]

Principle of guilt and presumption of innocence through the case law of the CJEU

From the case law of the ECtHR, we have examined and seen that the substantiation of conventional parameters that deal with the procedural sector relate to substantive criminal categories that are involved in normative situations.

189CJEU, see the dissenting opinion of the judge Paulo Pinto di Albuquerque in case of the ECtHR: G.I.E.M. srl. and others v. Italy of 28 June 2018.

The question of the recognition of the principle of guilt, as a fundamental right of the legal order of the Union and the case law of the CJEU, expressly recognize a procedural guarantee of the principle of guilt and the presumption of innocence.

According to Article 6, paragraph 2 of the ECHR, this is part of the fundamental rights recognized in a context that recognizes the right to a fair trial and equality of arms recognized in Article 6, paragraph 3 of the ECHR, as well as in the general principles of European Union law.[190]

The principle of guilt and the presumption of innocence recognized in Art. 48 CFREU (Peers and others, 2021) have already been affirmed by Advocate General Colomer in the Volkswagen case, who established the presumption of innocence as a fundamental right based on Art. 6, para. 2 ECHR and Art. 48 CFREU.[191]

190CJEU, C-222/84, Johnston of 15 May 1986, ECLI:EU:C:1986:206, I-01651.joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. of 6 October 2005, op. cit., par. 103: "(…) "in order to prevent the legal protection afforded by criminal jurisdiction from being circumvented by classifying criminal measures as disciplinary, administrative or civil measures, the European Court of Human Rights has declared that the concept of "criminal charge" within the meaning of Article 6(1) of the ECHR must be subject to an autonomous interpretation"; specifying that a Member State is not authorised to create additional bodies competing with the judicial power, if it does not want to create a risk of circumvention of the procedural guarantees provided for by Community law, drawing inspiration from Article 6(1) of the ECHR (and Article 47 of the Charter of Fundamental Rights) (…)". See also the conclusions of the Advocate General Verica Trstenjak in case: C-62/06, Fazenda Pública-Director Geral das Alfândegas v. ZF Zefeser-Importação and Exportação de Produtos Alimentares L of 3 May 2007, ECLI:EU:C:2007:611, I-11995, parr. 56-57.

191CJEU, Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, op. cit., par. 97.

In this spirit, the court in the Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd case highlighted Art. 48, no. 1 CFREU which was invoked by its appellants.[192]

The Advocate General Juliane Kokott, in the Schenker case, underlined that:

"(…) the principle of guilt in the express recognition of the presumption of innocence of Article 48 of the Charter (…) constitutes a necessary prerequisite for the presumption of innocence (…) it can be considered that the *nulla poena sine culpa* principle is implicitly contained both in Article 48, paragraph 1, of the Charter, and in Article 6, paragraph 2 ECHR, rules which are readily taken into account in proceedings concerning cartels. Ultimately, both the aforementioned provisions of the Charter and of the ECHR can be considered as procedural embodiments of the *nulla poena sine culpa* principle (…)" (Weitbrecht, 2013; Botta, Hardsdorfand, Frewein, 2014; Völcker, 2014).[193]

In the Schindler Holding case, Advocate General Juliane Kokott stated that:

"(…) general principles of law, which must be observed in cartel proceedings at Union level, include the principle *nulla poena sine culpa* (no punishment without guilt), which can be traced back to the principle of the rule of law and the principle of guilt (…) the principle *nulla poena sine culpa* is implicitly contained both in Article 48, paragraph 1, of the Charter, and in Article 6, paragraph 2 ECHR (…)".[194]

192CJEU, joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. of 6 October 2005, op. cit., par. 108.

193CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit., v. Corte E.D.U., 30 August 2011, G. v. United Kingdom.

194CJEU, C-501/11 P, Schindler Holding and others v. Commission of 18 July 2013, op. cit., par. 114.

In the Túrkevei Tejtermelö Kft. case, Lawyer Kokott noted that, in relation to the "polluter pays" principle and compliance with the principle of proportionality:

"(…) sanctions (…) the principle of legality of penalties, *nulla poena sine lege*, pursuant to Article 49, paragraph 1, first sentence, of the Charter (…) the presumption of innocence enshrined in Article 48, paragraph 1, of the Charter (…) the presumption of innocence also includes the principle of guilt, *nulla poena sine culpa*, which requires that there be guilt and therefore responsibility for the violation (…)".[195]

The presumption of innocence is thus recognised, entailing the principle of guilt.

In the IS (Illegality of the Order for the Prosecution of Criminal Offences) case,[196] the CJEU emphasized and recognized that, under Article 48 of the ECHR, every defendant is innocent until proven guilty. This is, therefore, not legally proven under Article 52, paragraph 3 of the ECHR (Peers and others, 2021). It

195CJEU, conclusions of the Advocate General J. Kokott in case: C-129/16, Túrkevei Tejtermelő Kft. v. Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség of 16 February 2017, ECLI:EU:C:2017:136, published in the electronic Reports of the cases. C-137/85, Maïzena v. Balm of 18 November 1987, op. cit., par. 15. CJEU, conclusions of the Advocate General Stix-Hackl in case C-210/00, Käserei Champignon of 27 November 2001, op. cit., par. 34. CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit., parr. 41-41, 68: "(…) Article 36(2) of the Waste Directive, the "polluter pays" principle set out in Article 191(2) TFEU, the principle of proportionality of punishment under Article 49(3) of the Charter of Fundamental Rights and the presumption of innocence under Article 48(1) of the Charter do not preclude the owner of leased land from being subject to an appropriate penalty based on the legal presumption that he is jointly and severally liable with the actual user of the land for the infringement of waste provisions which has occurred there, provided that, in principle, it is possible to rebut that presumption by providing reasonable indications (…)".

196C-564/19, IS (Illégalité de l'ordonnance de renvoi) of 23 November 2021, op. cit.

specified that the corresponding rights and their meaning as equal conferred by the ECHR. Article 48 corresponds to Article 6, paragraphs 2 and 3 of the ECHR.

The CJEU interprets and provides for Article 48 of the ECHR, which ensures a level of protection that does not violate or guarantee Article 6 of the ECHR as interpreted in the ECtHR.[197] This is a principle which:

"(…) implies that every accused person is presumed innocent until his guilt has been legally established (...)[198] deduces the inadmissibility of reversals of the burden of proof, the Commission having the task of proving the facts charged (…)".[199]

Regarding the burden of proof principle, Advocate General Colomer states:

"(...) the protection of the fundamental right to the presumption of innocence is of a substantial nature (...) the presumption of innocence prevents the

197CJEU, C-564/19, IS (Illégalité de l'ordonnance de renvoi) of 23 November 2021, op. cit., parr. 101, 104: "(…) in accordance with the settled case-law of the court, for the purposes of interpreting a provision of Union law, account must be taken not only of its wording, but also of its context and of the objectives pursued by the legislation of which it forms part (…)". C-127/14, Surmačs of 2 September 2015, ECLI:EU:C:2015:522, published in the electronic Reports of the cases, par. 28. C-2/15, DHL Express (Austria), of 16 November 2016, ECLI:EU:C:2016:880, published in the electronic Reports of the cases, par. 19. C-38/18, Gambino and Hyka of 29 July 2019, ECLI:EU:C:2019:628, published in the electronic Reports of the cases, par. 39

198CJEU, joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. of 6 October 2005, op. cit., par. 106: "(…) therefore precludes any formal finding and even any allusion to the liability of the person charged with a given infringement in a decision terminating the action, without the person having been able to benefit from all the guarantees normally granted for the exercise of the rights of defence in proceedings which follow their normal course and end with a decision on the merits of the charge (…)". T-474/04, Pergan Hilfsstoffe für industrielle Prozesse GmbH of 2 October 2008, ECLI:EU:T:2007:306, II-04225, par. 7.

199CJEU, C-199/92, Hüls AG-DSM NV of 8 July 1999, ECLI:EU:C:1999:358, I-04287, parr. 155-167.

imposition of a sanction unless guilt is proven (...) the prosecutor must prove that the accused committed the acts constituting the offence and that the other elements, of fact and of law, exist which allow his liability to be declared. It is at this point that the presumption of innocence and the burden of proof meet (…)".[200]

In the Fazenda Pública case, the Advocate General Trstenjak states that the reference to criminal matters and guilt must be proven by the prosecutor beyond any doubt. The principle of *dubio pro reo* is a:

"(...) particular expression of the principle of the presumption of innocence (…)".[201]

The CJEU stated in relation to the presumption of innocence that:

"(…) procedures relating to infringements of the competition rules applicable to undertakings (…) may result in the imposition of fines or penalties (…)" (Schwarze, 2005).[202]

200CJEU, Conclusions of the Advocate General Colomer in joined case: C-217/00, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P), Buzzi Unicem SpA of 11 February 2003, op. cit., par. 41. C-219/00 P, Cementir, Cementerie del Tirreno SpA v. Commission of 7 January 2004, ECLI:EU:C:2004:337, not published.

201Conclusions of the Advocate General Verica Trstenjak in case: C-62/06, Fazenda Pública-Director Geral das Alfândegas v. ZF Zefeser-Importação and Exportação de Produtos Alimentares L of 3 May 2007, op. cit., par. 60.

202CJEU, C-167/04 P, JCB Service v. Commission of 21 September 2006, ECLI:EU:C:2006:594, I-08935, parr. 50-53. C-199/92, Hüls AG-DSM NV of 8 July 1999, op. cit., par. 149. Conclusions of the Advocate General Colomer in case C-383/00, Volkswagen AG of 17 October 2002, op. cit., par. 269. joined cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd-Sumika Fine Chemicals Co. Ltd. of 6 October 2005, op. cit., parr. 104-105. C-266/06 P, Evonik Degussa GmbH, già Degussa GmbH v. Commission and Council of 22 May 2008, op. cit., 41. T-474/04, Pergan Hilfsstoffe für industrielle Prozesse GmbH of 2 October 2008, op. cit., conclusions of the Advocate General Vestendorf in case: T-1/89, Rhône Poulenc v. Commission of 24 October 1991, ECLI:EU:T:1991:38, II-00867.

In this spirit, the conclusions of the Advocate General Nicholas Emiliou in the HSBC Holdings plc. and others case specified that:

"(...) according to settled case law, given the nature of the infringements in question and the nature and degree of severity of the sanctions connected therewith, this principle also applies to procedures relating to infringements of the competition rules applicable to undertakings, which may lead to the imposition of fines or penalties[203] (...) the procedural principles should also be applied in proceedings relating to legal persons (particularly frequent for example in the competition sector) (...) it is expressly recognised that fundamental rights, which are part of the general legal principles and the observance of which is ensured by the Court, are recognised for undertakings[204] (except where they concern rights which cannot be enjoyed by a legal person) (...) Art. 2 of Regulation No. 1/2003 on competition, establishes that in all national or Community proceedings relating to the application of Articles 81 and 82 of the Treaty, the burden of proof of an infringement of Article 81, paragraph 1, or of Article 82 of the Treaty is incumbent on the party or authority which asserts such infringement[205] (…)

203CJEU, Conclusions of the Advocate General N. Emiliou in case: 12 May 2022, C-883/19 P, HSBC Holdings plc, HSBC Bank plc, HSBC Continental Europe, HSBC France v. Commission of 12 May 2002, ECLI:EU:C:2022:384, published in the electronic Reports of the cases, par. 121: "(…) The principle of the presumption of innocence is set out in Article 48 of the Charter, which, echoing Article 6, paragraph 2, of the ECHR, provides that 'everyone who has been charged shall be presumed innocent until proved guilty according to law (…)".

204CJEU, C-136/79, National Panasonic of 26 June 1980, ECLI:EU:C:1980:169, I-02033.

205In particular Articles 27 and 28: "(…) guarantee the rights of defence of the undertakings concerned, and in particular the right of access to the file, the right of undertakings to be heard by the Commission, recognise the possibility of submitting their observations in advance to third parties whose interests may be damaged by a decision, ensure wide publicity for the decisions adopted (all while safeguarding the protection of business secrecy and the confidentiality of information exchanged within the network) (…) doctrine complains that even Regulation 1/2003 continues to provide for a system of inversion of the burden of proof, in the absence of a

Regulation no. 2988/1955, in leaving the application of sanctions to the national administrative authorities and, therefore, to the relevant local procedures, art. 2, no. 4 of the Regulation specifies without prejudice to the applicable Community law and, therefore, the primacy of European Union law and the recognition of fundamental rights are also recognised for the procedural aspect, starting from the presumption of innocence recognised by art. 48 of the Charter (…)".

It was the ECtHR itself that accepted the notion of criminal proceedings which included the proceedings for the enforcement of an administrative offence which was part of the notion of criminal matters contemplated in Article 6 of the Convention (Delmas Marty, Truche, 1993; Labayle, 1995).[206]

The Advocate General Colomer in the Cementir case followed the path of the CFREU.[207]The conclusions of Advocate General

preventive verification tool such as authorisation, for those who intend to avail themselves of the conditions set out in paragraph 3 of Article 81 (which provides for the conditions whose observance allows for derogations from the prohibition of agreements, decisions and concerted practices referred to in Article 81); does not provide for the assistance of a lawyer in the assessment and does not recognise professional privilege for the company's internal lawyers (…)".

206CJEU, C-219/00 P, Cementir, Cementerie del Tirreno SpA v. Commission of 7 January 2004, op. cit., par. 26. order C-252/97, N v. Commission of 16 July 1988, ECLI:EU:C:1988:385, I-04871, par. 52. joined cases C-238/99 P C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P and C-252/99 P and C-254/99 P, Lymburgse Vinyl Maatschappij NV (LVM) and others of 15 October 2002, op. cit., par. 169: "(…) applies art. 6 ECHR as a general principle of Community law also before the Commission. which specifies that the same guarantees, including procedural ones, as in criminal law must also be recognized for punitive administrative sanctions; the author, however, admits some exceptions (for example the reversal of the burden of proof), provided that they are within the limits of "den menschenrechtlichen Verbüngungen des nationalen und internationalen Rechts" (…) even from a procedural perspective, the Italian administrative sanction system conforms to the "minimum rules" of "this procedure" required in this area by the Convention and the European Court of Human Rights, at least since the famous decision on the "Ozturk" case (1981) (…)".

207CJEU, C-219/00 P, Cementir, Cementerie del Tirreno SpA v. Commission of

Emiliou in the HSBC Holdings plc. and others case[208] stressed that:

"(…) according to settled case law, the principle of the presumption of innocence requires (…) in the exercise of their functions, the members of a judicial body must not proceed from the preconceived opinion that the accused has committed the crime of which he is accused; it also requires that the burden of proof lies with the prosecution, while any doubt in this respect benefits the accused (…) according to settled case law of the ECtHR (…) the principle of the presumption of innocence also precludes the premature assertion by public authorities of the opinion that the person accused of a crime is guilty, before this has been legally proven (…) leading the public to believe in the guilt of the person concerned, thereby damaging his reputation and dignity, thus prejudicing the calm and impartial assessment of the case by the competent authorities (…)[209] the presumption of innocence aims to ensure that a person is not found guilty, nor treated as such, before his guilt has been ascertained by a judge (...)[210] also applies in relation to the imposition of administrative sanctions having a criminal nature[211] (...)

7 January 2004, op. cit., par. 26: "(…) new European model of criminal procedure, which is characterised by the will, within a democratic Europe, to fight democratically against crime (…)".

208CJEU, conclusions of the Advocate General N. Emiliou in case: C-883/19 P, HSBC Holdings plc, HSBC Bank plc, HSBC Continental Europe, HSBC France v. Commission of 12 May 2002, op. cit., par. 121.

209C-883/19 P, HSBC Holdings plc, HSBC Bank plc, HSBC Continental Europe, HSBC France v. Commission of 12 May 2002, op. cit. par. 155: "(…) be recognized that these statements, by reason of the terms used and the manner in which they were made, are placed on an uncertain borderline between statements of mere suspicion and premature declarations of guilt. In the light of a series of elements, I am however inclined to believe that these statements, although unfortunate, are relatively "harmless" (…)".

210CJEU, C-344/08, Rubach of 16 July 2009, ECLI:EU:C:2009:482, I-97033, par. 31. Conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 31.

211CJEU, C-199/92, Hüls AG-DSM NV of 8 July 1999, op. cit., par. 149. Conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 36.

together with that of the personal nature of the penalties, which the Court guarantees compliance with in the context of the imputation to the parent company of the infringement of the competition rules committed by its subsidiary (…)".[212]

The presumption emerges only as a rule of a judgment, i.e. in *dubio pro reo* and as a rule of treatment which thus imposes on the accused the right to be treated as if he were innocent until the relevant definitive conviction has proven the contrary.

The Advocate General Priit Pikamäe in the Delta Stroy case[213] stated that:

"(…) recourse to presumptions, including in the context of Article 7 of the ECHR, and therefore to presumptions of liability (…) in the context of adversarial proceedings (…) possibility of rebutting such presumption of imputability of the crime, which thus reveals its rebuttable nature, as required by the Court (…)".[214]

The case law from both the CJEU and the ECtHR has aligned and recognised that presumptions of fact and law in the criminal field are permitted, kept within reasonable limits.[215] According

212CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 36: "(…) this imputation is based on the concept of "economic unity" and on the presumption of the effective exercise by the former of a decisive influence on the commercial policy of the latter by virtue of the participation relationships that bind them (…)".

213CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 34. CJEU, C-45/08, Spector Photo Group and Van Raemdonck of 23 December 2009, ECLI:EU:C:2009:806, I-12073, par. 43. C-546/18, Adler Real Estate and others of 9 September 2021, ECLI:EU:C:2021:711, published in the electronic Reports of the cases, par. 47.

214CJEU, conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., parr. 43-48.

215GC, T-48/05, Franchet and Byk v. Commission of 8 July 2008, ECLI:EU:T:2008:257, II-01585, par. 211. CJEU, C-199/92, Hüls AG-DSM NV of 8 July 1999, op. cit., par. 150.

to the Advocate General Bot in the ThyssenKrupp Nirosta case[216]:

"(...) requires Member States to limit the presumptions of fact or law provided for by criminal laws within reasonable limits, taking into account the importance of the interests at stake and respecting the rights of the defence (...) the presumption which does not exceed these limits is the one in which the intention of the perpetrator of insider dealing is implicitly inferred from the tangible elements characterising that breach: this presumption is rebuttable and the rights of the defence are guaranteed (…)".[217]

In the Delta Stroy case the CJEU stated that these limits:

"(...) in the present case, where a presumption has the effect of depriving a person of any possibility of clearing himself of the facts with which he is accused, thus depriving him of the benefit of the principle of the presumption of innocence[218] (...) the presumption of innocence represents the guarantee in procedural proceedings of the principle of guilt (...)".

A wealth of case law has emerged from a European perspective on this issue. Article 47 CFREU is based on fair trial procedures and the effectiveness of its protection.

The Advocate General Wathelet in the Milev case[219] referring to the guarantee of the principle of guilt and the presumption of innocence stated that:

"(…) Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty according to law (…) the level of

216C-352/09 P, Thyssen KruppNirosta v. Commission of 29 March 2011, op. cit., parr. 51, 161.

217CJEU, C-45/08, Spector Photo Group and Van Raemdonck of 23 December 2009, op. cit., par. 44.

218CJEU, Delta Stroi 2003, cit., § 48.

219CJEU, C-310/18 PPU, Miller of 19 September 2018, op. cit.

protection provided by Member States should never be lower than the standards of the Charter or the ECHR as interpreted by the Court of Justice and the European Court of Human Rights (…) applies to every stage of criminal proceedings, from the moment a person is suspected or accused of having committed a criminal offence or an alleged criminal offence until the decision as to whether the person has committed the criminal offence becomes final (…) Article 3 and Article 4(1) of Directive 2016/343 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision to maintain a pre-trial detention measure taken by a judicial authority, based on suspicion or evidence of guilt, provided that such decisions do not present the detained person as guilty (…)".[220]

According to the opinion of the Advocate General, the question that arises after the acceptance of the relevant Salabiaku doctrine is not removed, which is connected with the burden, the standard of proof and the strict liability of the Green Paper which has to do with the presumption of innocence of a directive, which specifically recognises that:

"(...) the criminal legislation of the States provides for crimes with strict liability and that such crimes are in conformity with the European

220CJEU, C-310/18 PPU, Miller of 19 September 2018, ECLI:EU:C:2018:732, published in the electronic Reports of the cases, par. 49. C-377/18, AH and others (presumption of innocence) of 5 September 2019, op. cit., Conclusions of the Advocate General Priit Pikamäe in case C-203/21, Delta Stroy 2003, of 9 June 2022, op. cit., par. 32: "(…) contrast to this case law, it will be highlighted the pusillanimity of the European legislator who excluded legal persons from the scope of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (...) indicated in recitals 14 and 15 of that legislative act – that it was premature to legislate at Union level on the presumption of innocence of legal persons, which should be protected by existing regulatory guarantees and case law, the evolution of which should make it possible to establish the possible opportunity for intervention by the Union (…)".

Convention for the Protection of Human Rights and Fundamental Freedoms even if the State does not have to prove that the accused has "acted with intent" (*mens rea*) (...)".

In this spirit, the way was paved for the resolution of the European Parliament relating to the resolution of 22 May 2012 based on a Union approach to criminal law (2010/2310(INI)), underlining that:

"(…) EU criminal law should, as a general rule, impose penalties only for acts committed intentionally or, in exceptional circumstances, for acts involving gross negligence, and must be based on the principle of individual culpability (*nulla poena sine culpa*) (...)".

Established guilt and substantive conviction

The case law we have seen so far has followed the application of the hypothesis of acquittal due to the statute of limitations, as well as the outcome of a related judgment that recognized the grounds for liability.

This solution was incompatible with criminal law, as we saw in the Varnava and Others case from the ECtHR, which relied on the application of a form of confiscation that considers that:

"(...) the crime was extinguished and liability had not been established by a conviction (…) conflicts with the principles of criminal legality just set out by the Court, which are an integral part of the principle of legality that Article 7 of the Convention requires respect. The disputed sanction is therefore not provided for by law within the meaning of Article 7 of the

Convention and is arbitrary (…)".[221]

Confiscation is compatible with a procedural outcome that is different from the formal conviction itself, given that the provision contains an incidental assessment of the conditions necessary for the application of a penalty and the determination of the guilt and responsibility of the individual, which are sufficient for the determination of guilt, which does not occur through a definitive conviction but as a substantive conviction and as a form of determination of responsibility in the case of amnesty and prescription.

As we saw in the GIEM case, the relative ambiguity reaffirmed the form of confiscation as representing a penalty. In the Sud Fondi case, the position of a determination of subjective and substantive responsibility is supported, which applies the sanction in the event of prescription.

The ECtHR forms confiscation in conflict with the presumption of innocence. The application of confiscation by a national superior court, through a pronouncement of prescription and the prior determination of criminal responsibility, is mandatory. In the Varnava and others case, it was stated in this regard that:

"(...) should not be seen as a mandatory rule (...) declaration of criminal responsibility complies with the guarantees established in Article 7 and is pronounced in proceedings compliant with Article 6 (...) a formal declaration of criminal responsibility of the applicant (§ 255), one must look at the

221 ECtHR, Varvara v. Italy of 29 October 2013, par. 72ss.

substance of the pronouncement, at the reasoning which is an integral part of the decision (…)".[222]

The rule of law, and trust in a justice system aim to prevent impunity in situations where the combined effect of complex crimes and short statute of limitations means that offenders are prosecuted for the consequences of their misconduct. Thus, according to the author's opinion, the rule of law is subject to the principle of legality, as a state power that prosecutes and punishes crimes in a complex manner.

The Commission mitigates the relevant requirements, and punishment is meted out according to the right to be forgotten and to the perpetrator. Otherwise, legal certainty requires the principle of legality to be sacrificed to the efficiency of a justice system where, as the judge observes, the crime is time-barred.

The reasons for prosecution do not prevail over the objectives of criminal punishment, which cannot be pursued. Fighting impunity means moving away from crimes subject to the statute of limitations. In the Varnava and Others case, the right to be forgotten is not a declaration of guilt that forms the statute of limitations on the crime. The core of the recognition of the application of the statute of limitations is not a conviction of substantive guilt.

222"(…) Court is thus entitled to look behind the operative part of a judgment and take account of its substance, the reasoning being an integral part of the decision (see, *mutatis mutandis*, Allen v. the United Kingdom [GC], no. 25424/09, § 127, 12 July 2013) (…)".

The application of confiscation as a penalty to a statute-barred crime signifies a substantive guarantee to a procedural meaning that adds and recognizes the contradictory nature of the statute of limitations, as we have seen previously in the Taricco case (Liakopoulos, 2019), which was compatible with the application of the confiscation form before the ECtHR.

The declaration of responsibility presents itself as an extension of the concept of a conviction against the accused, which is inadmissible by analogy *malam partem*. It is a conviction that essentially prohibits analogy against the accused, as the principle of legality does. This was evident in the ECtHR in Margus v. Croatia case:

"(...) Criminal proceedings by a public prosecutor (...) constitute neither a conviction nor an acquittal (...) such a decision does not fall within the scope of Article 4 of Protocol No. 7 to the Convention (*ne bis in idem*) (...) these two results (conviction or acquittal) can only be found in the dispositive part of a domestic decision, i.e. where the competent court addresses the outcome of the case (...) relevance for the application of the ne bis in idem principle in criminal procedure. The majority ignores this basic principle of criminal procedural law to the extent that it attempts to draw conclusions detrimental to the accused ("in substance, a conviction") from the reasons for a decision, when they are absent from the dispositive part (...) it seeks to find a "conviction in substance" regardless of whether the accused has been formally convicted, violates the core of the *ne bis in idem* principle (…)".[223]

The formal conviction in the substantive notion of the ECtHR

223ECtHR, Marguš v. Croatia of 27 May 2014.

invoked the protection of human rights (Ravasi, 2017). It exploited the human rights of the accused, who is subject to confiscation.

These rights are inadmissible for use *contra reum* and, according to the relevant ECtHR theory, for the benefit of the accused. A certain hypertrophy of criminal law is evident, which is unacceptable with the *malam partem* argument, which deprives the defendant of the protection of the principle of legality and formal conviction due to the relevant statute of limitations. Thus, criminal law supports and extends the punishment beyond the statute of limitations.

The judge and the principle of separation of powers exploit the criminal justice system as well as administrative and political objectives penalized and pursued by the Member States of the Union.[224]

A substantive conviction violates the presumption of innocence, and the determination of liability as the basis for confiscation, which condemns, violates the right to the presumption of innocence. Thus, a violation of Art. 6, paragraph 2 ECHR is applied to a state governed by the rule of law. Substantive conviction, as a liability, is based not on a medieval system but

224 "(…) judges, be they international or national, should always prosecute the former, not the latter, which is a matter of policy. One gets the impression that in some respects the present judgment is more an exercise of the latter than of the former. More importantly, the judge should not blame the defendants for the shortcomings of an irrational state criminal policy, including a policy with a "combined effect of complex crimes and relatively short statutes of limitations (…)".

on the revolution that puts an end to the absurdity of systems that repeat the same errors, that fail to respect principles, and that yield to the efficiency and non-retroactivity of the in *malam partem* rule.

Concluding remarks

The previous paragraphs have shown us that the now very rich jurisprudence and the dialogue between two courts, acting as "titans" for the protection of human rights and European justice, have allowed us to understand that the guilt principle and its educational nature have not only had a punitive character.

The journey was long, and difficult for the foreseeable future. From the Varnava and Others case of the ECtHR to the GIEM case, the guilt principle returns to a position that the principle of responsibility for the actions of others[225] does not recognize guilt as a fundamental and inalienable right.[226]

It is acknowledged that Article 6, paragraph 2, of the ECHR (Villiger, 2023) does not apply to a procedural venue as a material right that admits the presumptions of law and fact, encountered through repressive laws, since:

"(...) reasonable limits, taking into account the values at stake and preserving the rights of the defense (...)[227] recognizes the right of states to punish a fact

225ECtHR, E.L. and others v. Switzerland of 29 August 1997. A.P. and others v. Switzerland, op. cit.

226ECtHR, Salabiaku v. France, op. cit., parr. 15-17. Pham Hoang v. France, op. cit., parr. 21-22, 53.

227ECtHR, Salabiaku v. France, cit., par. 15.

of a material and objective nature without requiring a criminal intent and negligence as mere presumptions of guilt (…)".[228]

It was judge Pinto de Albuquerque who, through a dissenting opinion, tried to reconstruct through the Sud Fondi and the ECtHR ruling in the GIEM case that:

"(...) it applies *mutatis mutandis* at the level of Article 7 (...) clearly confusing the procedural guarantees of Article 6 and the material guarantees of Article 7 (...) it in fact exchanges the guarantees of Article 7, which are non-derogable, with the rights recognised by Article 6, for which derogations are foreseen (...) it sacrifices the principle of guilt on the altar of efficiency and this is not admissible (...)".

The ECtHR has rigorously followed a non-derogable nature of the principle of guilt in the criminal sector and as we have read in the GIEM case the affirmation of the principle of guilt thus presents the position we saw in the Varnava and others case as a "rare exception".

The long journey towards full recognition of the guilt principle in criminal matters was not debatable for the CJEU. The CJEU highlighted the uniform principle of effectiveness as an application of European competition law, which recognizes the *nulla poena sine culpa* as a legal principle, starting with the Schenker case.[229]

In the Aalborg Portland A/S case, the Advocate General Colomer recognized the guilt principle as a general principle of

228ECtHR, Salabiaku v. France, op. cit., parr. 15.

229CJEU, conclusions of the Advocate General J. Kokott in case: C-681/11, Schenker und Co AG and others of 28 February 2013, op. cit.

law that develops the limits of the *ius puniendi* of public authority as a principle that the regime of strict and no-fault liability also applies to legal persons.[230] This recognizes a principle based on Art. 48 CFREU.

Advocate General J. Kokott (Peers and others, 2021) establishes the related presumption of innocence. This is a principle recognized by Regulation No. 2988/1955. It does not regulate or punish the Union authorities that claim guilt for applying punitive sanctions under Article 5, which applies to legal persons. This position stems from the position of Advocate General Pitruzzella in the Sumal, S.L. v. Mercedes Benz Trucks España, S.L case[231]:

"(...) in the public enforcement of competition law, given the quasi-criminal nature of the sanctions imposed, some fundamental principles come into play, first and foremost the principle of personal responsibility, and its corollary according to which the imposition of a sanction and the identification of liability presuppose fault (*nulla poena sine culpa*) (...)".

The guilt principle in the European context finds application in *ius commune*. It is fundamental principle in a constitutional state that culpability under a sine qua non respects the dignity and freedom of a human being.

Criminal law, reduces the individual to a scapegoat. It has a

230CJEU, see the conclusions of the Advocate General Colomer in joined case: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. Aalborg Portland A/S v. Commission of 11 February 2003, op. cit.

231CJEU, conclusions of the Advocate General G. Pitruzzella in case: C-882/19, Sumal, S.L. v. Mercedes Benz Trucks España, S.L. of 15 April 2021, op. cit., par. 3.

general preventive function that preemptively satisfies the threat of criminal punishment and makes no sense in the case of behaviors that are based on fortuitous events. The individual controls the conduct and the occurrence of events or the possibility to acts differently.

The guilt principle is a tool that affirms the re-educational function. It constitutes a purpose of punishment in the constitutional state and guarantees respect for the dignity of the human person pursuant to Article 3 ECHR, as we noted in the Vinter case from the ECtHR.[232]

Guilt as a principle that instrumentalizes the re-educational function of punishment respects the fact that one does not need to be re-educated. The ECtHR has highlighted re-education as a tool that prevents recidivism, while maintaining that the idea of resocialization implements the assumption of personal responsibility such as accountability (Blanco Cordero, 2017),[233] which presupposes that the offender has acted culpably.

The Vinter case[234] did not include or recognize the re-educational function of punishment envisaged by the ECHR system. It ignores the purposes of a prison sentence, which re-education has a fundamental objective, and legitimately justifies

232ECtHR, Vinter and others v. United Kingdom of 9 July 2013.

233ECtHR, Dickson v. United Kingdom of 4 December 2007, par. 28: "(...) rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility (...)".

234ECtHR, Vinter and others v. United Kingdom, op. cit.

that a state governed by the rule of law, with a prison sentence, limits the fundamental rights of a convicted individual.

The ECtHR does not recognize re-education as a function of punishment. The re-socialization of a detained individual is based on an absolute, inalienable right that respects the dignity of the human person according to Art. 3 ECHR (Addo, Grief, 1998).

This article prohibits torture and inhuman and degrading treatment as a consequence of a prison sentence that does not, at the very least, aim to rehabilitate the inhuman and degrading treatment. Thus, punishment for those who are not guilty does not fulfill the rehabilitative function of inhuman and degrading treatment.

Within the scope of previous rulings,[235] European criminal policy has the prospect of long-term imprisonment as its rehabilitative objective. This is how the legislation in the constitutional sector of various European countries is valorised, according to which resocialisation as *a sine qua non* of prison sentences can also include life imprisonment[236]:

"(…) it is contrary to the provisions of the Constitution which recognises the dignity of the human person for the State to forcibly deprive a person of his

235ECtHR, Dickson v. United Kingdom, op. cit., par. 75. Boulois v. Luxembourg of 3 April 2012. Ēcis v. Latvia of 10 January 2019, par. 91.

236ECtHR, Vinter and others v. United Kingdom, op. cit., paras. 113-118, which is referred to the: "(...) the Federal Constitutional Court judgment of 21.6.1977, and along the same lines, the Italian Constitutional Court Judgment No. 274 of 27.9.1987 and the French Constitutional Court Decision No. 93-334 DC of 20.1.1994 (…)".

liberty without giving him the opportunity, at any time, to recover it (…) the German federal constitutional law states that the prison authorities have the duty to strive to pursue the rehabilitation of the prisoner and that re-education is constitutionally necessary in every society which is based on respect for human dignity (…)[237] the execution of a sentence, the prisoner should progressively progress (move) through the penitentiary system from the first days of detention, in which the punitive and retributive function is accentuated, to the last days in which the preparation for release is accentuated (…) an "unjust" intrusion of the state into his personal sphere (…)".[238]

In the Murray v. the Netherlands case,[239] the ECtHR has taken a decisive position, establishing re-education as the object of a positive obligation on the part of the state, which not only recognizes but also guarantees the purpose of punishment (Meijer, 2017).

This obligation requires positive action to achieve this purpose (Tomás-Valiente Lanuza, 2016). It also functions as a guarantee of appropriate treatment and as a positive obligation based on Art. 3 ECHR. It respects human dignity, an absolute and inalienable right (Martufi, 2018). The state's failure to positively

237ECtHR, Vinter v. United Kingdom, op. cit., par. 113.

238ECtHR, Vinter v. United Kingdom, op. cit., par. 114-115.

239ECtHR, Murray v. The Netherlands of 26 April 2016: "(…) the contents of the Vinter on the basis of five binding principles: respect for the principle of legality (intended, according to the usual Strasbourg parameters, as clarity and certainty of the applicable law); the principle of ascertaining the functional basis for the continuation of the prison sentence; the principle of ascertaining within predefined deadlines (for life prisoners, the reference term is 25 years); the principle of fair procedural guarantees; the principle of the right to a judicial review of decisions on early release (…)".

provide a specific opportunity for re-education and social reintegration violates its obligation to respect the ECHR.[240]

In the same spirit, judge Albuquerque in the Murray case underlined that:

"(...) point of no return in its standard-setting function of protection of human rights of prisoners in Europe (...)".

These are rules applied to individual sections of the Court[241] as in the Hutchinson v. United Kingdom case.[242]

According to the ECHR, the British system grants life-sentence review as a political position. In this regard, the dissenting opinions of judge Pinto de Albuquerque and judge Sajó (Van Zyl Smit, Appleton, 2016) consider the inconsistency of the ECtHR system to be a matter of political expediency. The Hutchinson case risks compromising the affirmation of prisoners' rights and of prison as a place of law and rehabilitation, undermining thus the legal civilization that

240ECtHR, Murray v. The Netherlands, op. cit., par. 104. Hutchinson v. United Kingdom of 17 January 2017, parr. 42-45.

241ECtHR, Trabelsi v. Italy of 13 April 2010. Lázló Magyar v. Hungary of 20 May 2014.

242ECtHR, Hutchinson v. United Kingdom of 17 January 2017, which is affirmed in par. 56-57 that: "(…) Section 30 of the Crime Act 1997 which gives the Secretary of State the power to release life prisoners when "exceptional circumstances" exist on compassionate grounds-are sufficient in light of the reassurances provided by the McLoughlin judgment, according to which the expression "exceptional circumstances" would be the source of a precise obligation for the Secretary of State to proceed with a review of the sentence if the latter becomes devoid of legitimate functional basis, in light of the progress made by the prisoner in the re-education process (…) the temporal parameter, the Secretary of State is not obliged to initiate the review procedure *ex officio*, but the possibility for the prisoner to turn to him at any time on the basis of Section 30 guarantees, according to the court, the compatibility of the system with art. 3 ECHR also from this perspective (…)".

recognizes the function of punishment. This approach is achieved in the Vinter case.

Legal certainty interprets the common law system as a function of guaranteeing the freedom and dignity of life-sentenced prisoners. The ECtHR's re-educational function of punishment is recognized as a European legislation in the criminal sector, which is connected to its jurisprudence of the ECtHR as can be seen in the Advocate General Yves Bot's affirmations in the Trayan Beshkov/Sofiyska rayonna prokuratura case[243] which highlights the modern concept:

"(…) to allow the reintegration of the convicted person into society (…) the reintegration (re-education) function of the sentence which is linked, in the phase of its execution, to the fundamental principle of its personalization (…)".

In the same line of thought the Advocate General Yves Bot, in the Wolzenburg case[244] and in the Openbaar Ministerie v. Popławski case[245]:

"(…) attributed by the Union legislature to the objective of social reintegration (…) Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, for the purposes of their enforcement in the European Union (…) (which also

243CJEU, C-171/16, Beshkov of 21 September 2017, ECLI:EU:C:2017:710, published in the electronic Reports of the cases, par. 47.

244CJEU, conclusions of the Advocate General Yves Bot in case: C-123/08, Dominic Wolzenbug of 24 March 2009, ECLI:EU:C:2009:616, I-09621.

245CJEU, C-579/15, Popławski of 29 June 2017, ECLI:EU:C:2017:503, published in the electronic Reports of the cases, par. 34.

applies, *mutatis mutandis*, to the enforcement of sentences in the cases referred to in Article 4, point 6, of Framework Decision 2002/584), Article 3, paragraph 1 of which specifies that it has the aim of promoting the social reintegration of the sentenced person (…)[246] to enable the executing judicial authority to attach particular importance to the possibility of increasing the opportunities for the social reintegration of the requested person once the sentence to which he has been sentenced has been served[247] (…) with a view to respecting the principle of rehabilitation the Court of Justice (Tinsley, 2013; Niblock, 2016; Broberg, Fenger, 2016)[248] establishing that the execution of a European arrest warrant must be postponed if there is a real risk of inhuman or degrading treatment due to the conditions of detention of the person concerned in the Member State issuing the warrant[249] (…) is adopted in the application of Directive 2004/38 (on the free movement of citizens of the Union) in relation to the possibility of adopting a decision of expulsion on grounds of public policy and public security[250] or in the interpretation of the rules on expulsion following the execution of a custodial sentence pursuant to Directive 2004/38 (…)".[251]

In his conclusions, the Advocate General Yves Bot[252] stated that:

246CJEU, C-554/14, Ognyanov of 8 November 2016, ECLI:EU:C:2016:835, published in the electronic Reports of the cases, par. 50.

247CJEU, C-42/11, Lopes Da Silva Jorge of 5 September 2012, ECLI:EU:C:2012:517, published in the electronic Reports of the cases, par. 32-33. C-579/15, Popławski of 29 June 2017, op. cit.

248CJEU, C-404/15 and C-659/16 PPU, Aranyosi and Căldăraru of 5 April 2016, ECLI:EU:C:2016:148, published in the electronic Reports of the case.

249CJEU, C-220/18 PPU, Generalstaatsanwaltschaft (Conditions of detention in Hungary) of 25 July 2018, ECLI:EU:C:2018:589, published in the electronic Reports of the cases.

250CJEU, C-145/09, Tsakouridis of 23 November 2010, ECLI:EU:C:2010:808, I-11979. Conclusions of the Advocate General Maciej Szpunar in joined cases: C-316/16 and C-424/16 B of 24 October 2017, ECLI:EU:C:2017:256, published in the electronic Reports of the cases, parr. 110-109.

251CJEU, C-145/09, Tsakouridis of 23 November 2010, op. cit., parr. 46-50.

252CJEU, C-145/09, Tsakouridis of 23 November 2010, op. cit.

"(…) in ancient times, among theologians, philosophers or theorists, the idea that a sentence should have a reintegration function for the convicted person is today a principle shared and affirmed by all modern laws, in particular by those of the Member States (…) respect for the principle of the reintegration function of the sentence does not be dissociable from the notion of human dignity and, as such, it belongs to the family of general principles of Union law (…)".[253]

It is thus a question of re-education which precisely underlies the Union legislation on criminal matters with the prior recognition of the principle of guilt, thus imposing full and precise respect for it.

Since the 1960s, the jurisprudence of the CJEU has recognized the rights and fundamental principles of constitutional traditions for member states, which have established the principle of proportionality of punishment based on Art. 49 CFREU and on Art. 3 ECHR (Lucas, 2018).[254]

This establishes a prerequisite for pursuing the re-educational function of punishment, which represents an exclusive component, functional to the principle of individualization. This principle requires the choice of a type of crime that identifies punishment as the fundamental criterion of proportionality, which is manifested in one's culpability.

The punishment proportional to culpability suggests to the

253ECtHR, Mastromatteo v. Italy of 24 October 2002, par. 72.

254ECtHR, Vinter v. United Kingdom, op. cit., par. 102. C-41/76, Donckerwolcke and others v. Procureur de la République of 15 December 1976, ECLI:EU:C:1976:182, I-01921.

offender a specific predisposition for rehabilitation, which applies this principle to criminal and administrative sanctions that have a punitive nature according to Art. 49 CFREU. In this regard:

"(…) paragraph 3 takes up the general principle of proportionality of crimes and penalties enshrined in the constitutional traditions common to the Member States and in the case law of the Court of Justice of the European Communities (…) exclusively in the matter of administrative sanctions applied by the Community institutions[255] (…) function of guaranteeing the essence of fundamental rights, preventing them from being compromised by unjustified and disproportionate attacks (…)".[256]

This is a direction that includes sanctions in the area of unfair competition as parameters of severity for a sanction and for culpability (Favret, 2004),[257] which is in accordance with the principle of proportionality and Regulation no. 2988/1955, Art. 2, no. 3. It is a prevention of typologies of criteria governing the choice of sanctions by the European legislator, connected to the

255CJEU, C-537/16, Garlsson Real Estate SA and others of 20 March 2018, ECLI:EU:C:2018:193, published in the electronic Reports of the cases, par. 56. C-231/20, MT v. Landespolizeidirektion Steiermark and others (Machines à sous) of 14 October 2021, ECLI:EU:C:2021:845, published in the electronic Reports of the cases, par. 45: "(…) the severity of the sanctions imposed is appropriate to the gravity of the violations they repress, ensuring, in particular, a truly dissuasive effect, without going beyond the limits of what is necessary to achieve the aforementioned objective (…)". C-679/18, OPR-Finance of 5 March 2020, ECLI:EU:C:2020:167, published in the electronic Reports of the cases, par. 26. C-524/15, Menci of 20 March 2018, ECLI:EU:C:2018:197, published in the electronic Reports of the cases, par. 55. C-77/20, K.M. (Sanctions infligées au capitaine de navire) of 11 February 2021, ECLI:EU:C:2021:112, published in the electronic Reports of the cases, par. 25.

256CJEU, C-25/70 (Einfuhr-und Vorratsstelle Getreide v. Köster of 17 December 1970, ECLI:EU:C:1970:115, I-01161.

257CJEU, conclusions of the Advocate General Ján Mazák in case: C-328/05 P, SGL Carbon AG of 18 January 2007, ECLI:EU:C:2007:277, I-03921, par. 54.

relevant cases, that is, with the objective character, nature, severity of the irregularity and the benefit and advantage received.

The subjective nature of responsibility is presented as a criterion that refers to culpability. The Regulation calls for the graduation of a sanction that involves an editorial level as an evaluation of forms of negligent and intentional liability. This is an implicit recognition of the principle of culpability as the foundation of punishment and a criterion for commensuration.

The proportionality of the punishment is relevant to the competences provided for in Art. 83 TFREU for the formulation of the crime.

The road has already been long, but it will remain challenging for the near future for the guilt principle and European criminal law. Case law, always interesting and constantly evolving, seeks to precisely and definitively establish the guilt principle, which represents a fundamental right of the Union that respects human dignity, and the model of a democratic state, as a guilt principle that is among the fundamental rights. This is the result of common constitutional traditions for the member states, according to Article 6 TEU, which are part of Union law, as a challenge for the future.

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